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No. _____

In The

Supreme Court of the United States

SHELBY COUNTY SCHOOL DISTRICT; LEON MOONEYHAN, Officially and Individually; BRUCE SLATE, Officially and Individually,

Petitioners,

v.

DONNA COCKREL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Sixth Circuit erred in holding that a fifth grade teacher's curricular presentations on hemp to her elementary students enjoyed First Amendment protection as expressions on a matter of public concern?

2. Whether the United States Court of Appeals for the Sixth Circuit erred in holding that the balancing of interests required under *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983), favored the plaintiff teacher below, given the record of disruption arising from her in-school activities?

3. Whether the decision of the United States Court of Appeals for the Sixth Circuit below conflicts with the causation standard mandated under *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), in the summary judgment context, when the summary judgment record showed that the plaintiff teacher's contract stood terminated for cause and she lost her certificate to teach as of a time pre-dating her allegedly impermissibly motivated termination?

PARTIES TO THE PROCEEDING

The Petitioners are the Shelby County School District; Leon Mooneyhan, Officially and Individually; and Bruce Slate, Officially and Individually. The Respondent is Donna Cockrel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Shelby County School District; Leon Mooneyhan, Officially and Individually; and Bruce Slate, Officially and Individually, respectfully petition as follows for a writ of certiorari to review the November 9, 2001, Opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 270 F.3d 1036 (6th Cir. 2001). (App., p. 1.)

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky, was entered on January 28, 2000, and is reported at 81 F.Supp.2d 771 (E.D.Ky 2000). (App., p. 45.) The same Court entered an Order denying Respondent Cockrel's Motion for Reconsideration on February 15, 2000, which is unreported. (App., p. 58.)

The Decision of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc is unreported. (App., p. 60.)

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was issued on November 9, 2001, and

a timely petition for rehearing and suggestion for rehearing en banc was denied by that Court on January 16, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

FEDERAL STATUTE INVOLVED

The action below was brought under 42 U.S.C. § 1983, which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall

not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATE STATUTES INVOLVED

KRS 161.790 (Michie 1996) (App., p. 61)

KRS 161.120 (Michie 1996) (App., p. 63)

KRS 161.020(1) (App., p. 66)

KRS 218A.010(14) (App., p. 67)

KRS 218A.1422 (App., p. 67)

STATEMENT OF THE CASE

Respondent, Donna Cockrel ("Cockrel"), enjoyed tenure as a teacher in the Shelby County, Kentucky, public school system prior to July 15, 1997. Under KRS 161.790 (App., p. 61), her contract could be terminated only for cause. The same statute gave her the right to a hearing to contest charges in support of termination. Superintendent, Dr. Leon Mooneyhan ("Mooneyhan"), of the Shelby County Public Schools served charges in support of Cockrel's termination of employment on grounds of insubordination, conduct unbecoming a teacher, and inefficiency, incompetency, and neglect of duties on July 15, 1997. The charging letter set forth seventeen (17) instances of misconduct, including Cockrel's failure to teach the school's

designated curriculum; calling her principal and supervisor, Petitioner Bruce Slate ("Slate"), a liar and calling him inappropriate names in the presence of staff and students; failure to appropriately implement federal programs; student privacy rights violations; failure to keep parents apprised of student progress; dishonesty and deceptive conduct regarding timing of actor Woody Harrelson's visit to her school; and cursing and venting anger in front of students, as well as subjecting students to embarrassment and disparagement. The charging letter is reproduced in the Appendix (App., p. 68).

Cockrel was entitled to a hearing on charges in support of her termination of employment before an administrative tribunal, unaffiliated with the Shelby County Public Schools. *See* KRS 161.790(4) (Michie 1996) (App., p. 62). Cockrel initially requested a hearing and subsequently withdrew such request, resulting in entry of an August 14, 1997, order by the state hearing officer cancelling the hearing. As a result of entry of this order, Cockrel's termination for the causes set forth in the July 15, 1997, charging letter remained final, *see* KRS 161.790(3) (Michie 1996), and she did not file any state court action purporting to appeal the termination of her tenured contract for cause.

As required under KRS 161.120 (Michie 1996) (App., p. 63), Mooneyhan reported the charges in support of termination of employment as possible grounds for action on Cockrel's teaching certificate by the Education Professional Standards Board ("EPSB"). The EPSB is the state agency which oversees issuance and revocation of teaching certificates in Kentucky. Under KRS 161.020(1), a person must hold proper certification to be eligible to serve

as a teacher. (App., p. 66.) Cockrel agreed to entry of an order in Kentucky EPSB Case No. 97-07144, on or about March 11, 1999, directing the surrender of her teaching certificate retroactively to June 30, 1997, through June 30, 1999, and suspending her certificate for two (2) years (July 1, 1999, through June 30, 2001). This administrative order confirmed Cockrel's ineligibility to teach in any Kentucky school district for a period actually pre-dating Cockrel's July 15, 1997, termination.

Cockrel filed her Complaint in the United States District Court for the Eastern District of Kentucky on June 4, 1998, alleging that her termination of employment was in retaliation for exercising her First Amendment right of free speech in making hemp presentations to her fifth grade elementary class. On May 30, 1996, the last day of the school term, actor Woody Harrelson and other hemp advocates attended Cockrel's classroom at the Simpsonville Elementary School in Shelby County, Kentucky, for purposes of making a presentation on hemp. Cockrel claimed not to have known about Harrelson's impending visit prior to an hour and a half or so before his arrival. As part of the hemp activities, Cockrel's guests passed out hemp seeds to the children. These seeds are an illegal substance in Kentucky. *See* KRS 218A.010(14) (App., p. 67); KRS 218A.1422 (App., p. 67). Cockrel oversaw this presentation on the same day that the elementary school celebrated its Drug Awareness Resistance Education ("D.A.R.E.") program graduation. Cockrel claims to have told Principal Slate in April of 1996 that representatives of the Cable News Network ("CNN") might visit her classroom in connection with a program on "Saving the

Trees," but Slate did not learn of the nature of the contemplated presentation until being advised of same after the presentation commenced by the Simpsonville Elementary School's D.A.R.E. officer, Shelby County Deputy Sheriff Audrey Yeager. Cockrel's Complaint alleges "Defendant Slate was videotaped stating to news media representatives that he would have prevented the visit by CNN and Mr. Harrelson if he had known it was about industrial hemp." (Complaint, ¶ 13; Joint Appendix, hereinafter "J.A.," p. 13.)

Cockrel's hemp presentation utilizing a high profile media figure and involving the presentation of contraband to elementary age students was unsettling to the elementary school environment. It generated complaint letters from teachers, other school employees, and parents, which focused in the main on the mixed message being sent to Cockrel's fifth grade students through the display of hemp seeds on the same day as the D.A.R.E. graduation.

After an investigation conducted by the school district's attorney, Mooneyhan reprimanded Cockrel for, among other things, allowing the hemp seeds to be passed out on the day in question as well as her deceptiveness in connection with Harrelson's visit in that there was evidence indicating she knew of same in advance of the morning in question. This was reported to the Kentucky EPSB as well. In contrast with the reporting of Cockrel's subsequent termination for cause, the EPSB took no action on Cockrel's certificate with respect to this report and issued a dismissal without prejudice on or about November 25, 1996.

In June of 1996, the Simpsonville Elementary School implemented a new visitors policy. Cockrel requested and obtained approval under the policy for a second Harrelson visit on January 22, 1997. Harrelson failed to attend on the first scheduled date. A group of parents arrived at the school and voiced their opposition. Harrelson did come to the school at Cockrel's behest under the policy on January 29, 1997, and his visit was protested by a group of parents. Harrelson made a short presentation in Cockrel's classroom. This second visit generated letters of protest to the school administration from parents, staff, and community members. The Simpsonville Elementary School parent-teacher association met and issued a resolution in February of 1997 calling upon Superintendent Mooneyhan to terminate Cockrel's employment. Several parents requested and were permitted to transfer their children out of Cockrel's class. (J.A., pp. 305-306, 320) (parent letters and class roll documenting removal of children from Cockrel's class.)

The Petitioners filed their motion for summary judgment below on December 30, 1999, and argued that Cockrel's claimed expressive activities did not enjoy First Amendment protection. The district court granted the motion, concluding that Cockrel's hemp presentations did not amount to speech and that, in any event, the expressive conduct at issue did not enjoy constitutional protection. (App., p. 45.) Applying *Connick v. Myers*, 461 U.S. 138 (1983), and drawing support from *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990), the district court reasoned:

> "According to the appellate court, Kirkland's reading list did not rise to a level of public

> concern, which is required to attain the status of First Amendment speech. *See id.* at 799. The *Kirkland* court concluded that it takes more than the 'speaker's interest in the subject matter' to create public concern. *Id.* at 798. Instead, the speech communicated by a teacher must be conveyed 'in his role as a *citizen* and not in his role *as an employee* of the school district.' *Id.* at 799 (emphasis in original). Said reasoning tracks the Supreme Court's discussion in *Connick* that the topic of an employee's speech does not become a matter of public concern just 'because its subject matter could, in different circumstances, have been the topic of communication to the public that might be of general interest.' *Connick*, 461 U.S. at 148 n.8." (App., p. 53.)

Cockrel did not file a response to the Petitioners' motion for summary judgment within the time permitted by the district court's rules, and the district court denied her post-judgment motion to reconsider. (App., p. 58.)

Cockrel appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit rejected the foregoing district court analysis, and expressly rejected the Fifth Circuit's holding in *Kirkland* and the Fourth Circuit's decision in *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir.) (en banc), *cert. denied*, 525 U.S. 813 (1998)) as erroneous readings of *Connick*. The Sixth Circuit determined that *Connick* makes clear that "the key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on matters of public concern." (App., p. 26.)

Further, notwithstanding a survey of the disruption occasioned by Cockrel's activities as "evidence of a contentious and periodically disrupted work environment [which] weighs in favor of the defendants . . . " (App., p. 30), the Sixth Circuit concluded that the balancing mandated under *Pickering v. Board of Education*, 391 U.S. 563 (1968), favored Cockrel. The court found Cockrel's hemp presentations to her fifth grade elementary class in the course of the school day substantially involved matters of public concern thereby requiring a "stronger showing" by the Petitioners on the issue (App., p. 28). Further, the court found the school officials below were in no position to invoke the concerns of school efficiency and harmony "as reasons supporting their decision to discharge Cockrel" based upon its conclusion that Cockrel had obtained prior approval to host the classroom presentations. (App., p. 31.) Finally, with respect to application of the causation standard mandated under *Mount Healthy Board of Ed. v. Doyle*, 429 U.S. 274 (1977), the Sixth Circuit held Cockrel adduced sufficient proof to create a jury issue even though it was undisputed that her contract stood terminated for cause and she had surrendered her certificate to teach as of a date pre-dating the termination of employment she challenged. (App., pp. 33-42.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW MERITS THIS COURT'S INTERVENTION BECAUSE IT FAILS TO PROPERLY APPLY THE *CONNICK* PUBLIC CONCERN TEST TO THE TEACHER'S CURRICULAR PRESENTATIONS, AND IT CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS

A. The Decision Below Does Not Follow *Connick*

In *Waters v. Churchill*, 511 U.S. 661, 675 (1994), a plurality of this Court emphasized "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer."

Drawing upon its previous holding in *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court stated in *Connick*:

> "The repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that governmental offices could not function if every employment decision became a constitutional matter."

Connick, 461 U.S. at 143 (footnotes omitted).

Further, in "the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs." *Connick*, 461 U.S. at 144-145.

Thus, "when a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest," the expressive conduct at issue does not enjoy protection. *Connick*, 461 U.S. at 147. *Cf. U.S. v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995).

"The inquiry into the protected status of speech is one of law not of fact." *Connick*, 461 U.S. at 148 n. 7. Further, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record." *Connick*, 461 U.S. at 147-148.

Cockrel's purportedly protected activity involved the use of a high profile media figure making presentations to her fifth grade elementary class during the course of the regular school day as an instructional activity. Indeed, Cockrel framed the issues for consideration by the Sixth Circuit below as whether her "classroom presentations about growing industrial hemp in Kentucky" constituted protected First Amendment speech.

Cockrel's purportedly protected expressive activity entailed the actual performance of duties in the service of her public employer. The Sixth Circuit determined that because the matter of appropriate uses for industrial hemp touched upon a matter of general political interest, Cockrel's employee activities enjoyed First Amendment protection. (App., pp. 22-26.) However, the *Connick* "public concern" analysis is undergirded by the recognition that a public entity is given much greater latitude *as an employer* than the entity has as a sovereign dealing with

the public at large. The Sixth Circuit's reading of *Connick* for the proposition that the key question is whether in fact the speech at issue touches upon a matter of public concern (App., p. 26), draws all such expressions of a public employee, even if performed as part of their duties, within the ambit of First Amendment protection. This directly clashes with the "common sense realization that governmental offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143. The Sixth Circuit's fundamental misreading of *Connick* – finding First Amendment protection for classroom, employee expressive activity not undertaken as a citizen – calls for review by this Court.

Review is additionally compelled by the Sixth Circuit's sole focus on whether the content of the speech at issue implicated a matter of social or political importance with no analysis of the form and context of the expressive activity as mandated by *Connick*. Cockrel did not engage in advocacy relating to industrial hemp by writing a letter to a newspaper, or addressing a public meeting. *Cf. Pickering*. Her "classroom presentations" encompassed the performance of her very duties as an employee. No danger of the suppression of a public employee's right to participate in public affairs was at issue. *Cf. Connick*, 461 U.S. at 144-145. Further, with respect to the context of the classroom expressions at issue, the Sixth Circuit overlooked this Court's recognition that the daily operation of school systems is committed to local school authorities. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (student publication case recognizing oversight authority of school officials regarding curricular-related speech); *Bethel School Dist. No. 403 v. Frazier*, 478

U.S. 675 (1986) (determination of what manner of speech in classroom or school assembly is inappropriate properly rests with school board). The Sixth Circuit's holding is squarely at odds with *Connick*, warranting review by this Court.

B. There Is A Conflict Among The Circuits Regarding Application Of *Connick* To Curricular-Related Teacher Speech

In *Kirkland*, the Fifth Circuit held a teacher's selection of a reading list was not afforded First Amendment protection. Under the Fifth Circuit's straightforward reading of the *Connick* rationale, "public employees are entitled to the same measure of constitutional protection as enjoyed by their civilian counterparts when speaking as 'citizens' and not as 'employees' " *Kirkland*, 890 F.2d at 798. *Kirkland* emphasized the fact that because the teacher's curricular decision did not entail advocacy of a particular curriculum in public meetings before the school district or in any other public forum, but was premised on the classroom presentation of information, *Connick*'s "public concern" test was not satisfied. *Kirkland*, 890 F.2d at 800-801.

In *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir.) (en banc), *cert. denied*, 525 U.S. 813 (1998), a teacher argued she had engaged in protected speech in selecting, producing, and directing a controversial play in the same way public employees have a First Amendment right to express their views over matters of public concern and that such "speech" could not be suppressed. The teacher was transferred to another position and claimed

the transfer was impermissibly based on the exercise of her protected conduct. Relying on *Connick, supra,* the Fourth Circuit determined the selection of the play and the principal's desire to edit same with the approval of the superintendent were not matters of public concern, stating the case presented "nothing more than an ordinary employment dispute." *Boring,* 136 F.3d at 368.

The decision below expressly rejects the holdings of the Fourth and Fifth Circuits as misreadings and over extensions of *Connick.* This conflict among the Circuits on the fundamental issue of whether a teacher's curricular-related speech (representing a public employee's actual exercise of job duties) enjoys protection under *Connick* warrants the exercise of this Court's certiorari jurisdiction.

II. THE DECISION BELOW CONFLICTS WITH *PICKERING* AND *CONNICK* WITH RESPECT TO THE REQUIRED BALANCING OF INTERESTS

Even as to protected speech, a public employee's First Amendment interests are protected only insofar as such interests are of a greater weight than the governmental employer's interests promoting the efficiency of the public services it performs through its employees. *Pickering,* 391 U.S. at 567-571. The disruption occasioned by Cockrel's activities is surveyed by the Sixth Circuit as follows:

> "For example, following Harrelson's first visit to Simpsonville, numerous members of the school's faculty and staff circulated and or signed letters addressed to school officials criticizing Cockrel's actions in advocating the use

> of industrial hemp to her students. Cockrel thereafter expressed her displeasure with her co-workers' sentiments on several occasions. As discussed earlier, following D.A.R.E. officer Yeager's criticism of the Harrelson visits, Cockrel no longer wanted the officer in her classroom instructing her students. Cockrel asked Slate to find a replacement for Yeager as well. Cockrel's termination letter detailed several instances of disputes Cockrel had with co-workers, including an instance in which Cockrel jerked a phone away from a co-worker who had signed one of the letters speaking out against the Harrelson visit, and an incident in which Cockrel told two co-workers "not to waste their breath after they said 'good morning' to [her.]" J.A. at 54, 245-46. At least one of these co-workers had also signed a letter critical of Cockrel's decision to speak about industrial hemp.
>
> Many parents and members of the school community also expressed great concern over Cockrel's decision to invite speakers to her class who advocated the use of industrial hemp. Parents wrote letters to Principal Slate and Superintendent Mooneyhan in opposition to Cockrel's industrial hemp presentations, and a small number came to Simpsonville Elementary to protest on the final two occasions Harrelson was scheduled to visit. In addition, the PTA passed a position statement recommending that Cockrel no longer teach in the Shelby County School District." (App., pp. 29-30.)

The Sixth Circuit's determination that Cockrel's activities enjoyed First Amendment protection in the face of this acknowledged record of disruption warrants this Court's attention as a failure to follow *Pickering* and

Connick. First, citing to *Leary v. Daeshner*, 228 F.3d 729 (6th Cir. 2000), the Opinion required Petitioners to make a "stronger showing" of their interests in promoting efficiency and workplace harmony based on the conclusion that Cockrel's employee activities "substantially" involved matters of public concern. (App., p. 28.) However, *Leary* was a preliminary injunction case involving teachers speaking out on, *inter alia*, potential violations of the law by the school district in which the school board "essentially conceded the point" of First Amendment protection. *Leary*, 228 F.3d at 738.

The Sixth Circuit's imposition of a heightened burden at the outset here runs afoul of the *Pickering* balancing test. Amplifying on that test in *Connick*, this Court assessed the "manner, time and place" in which the subject questionnaire was distributed and placed special emphasis on the fact that "the questionnaire was prepared and distributed at the office . . . ." Further, "[e]mployee speech which transpires entirely on the employee's own time, and in non-work areas of the office, bring different factors into the *Pickering* calculus and might lead to a different conclusion," *Connick*, 461 U.S. at 153 n. 13, and "the fact that Myers, unlike Pickering exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered." The Sixth Circuit's imposition of a heightened burden in this case involving employee "on the job" expression giving rise to substantial actual – rather than feared – disruption,[1] cannot be squared with *Connick*.

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[1] Under *Connick*, even the legitimate fear of disruption of government offices and destruction of working relationships

Second, construing the summary judgment record in a light most favorable to Cockrel and acknowledging it would ordinarily give substantial weight to the government employer's concerns of work place efficiency, harmony and discipline, the Sixth Circuit nevertheless determined that Petitioners permitted Cockrel's presentations and, accordingly, were in no position to invoke the substantial disruption surveyed in the Opinion to "shield" the termination decision. (App., p. 30-31.)

In this vein, the Sixth Circuit states that "[d]efendants now forward concerns of school efficiency and harmony *as reasons supporting their decision to discharge Cockrel.*" (App., p. 31.) (Emphasis added.) Under *Connick*, the matter of whether a plaintiff's claimed expressions enjoy protection presents a question of law, *Connick*, 461 U.S. at 148, n. 7, and this does not entail an assessment of the alleged motivations of Defendants. The matter of the substantial disruption occasioned by Cockrel's activities relates in this context not to the factual reasons supporting the decision to discharge Cockrel; rather, the evidence of disruption and inefficiency speaks to the threshold question of law of whether Cockrel's activities enjoy protection. Thus, for example, in *Boring*, 136 F.3d at 371 n. 3, the Fourth Circuit discounted the matter of whether the teacher's production of the controversial play at issue was within the parameters of school policy because, as here, no procedural due process challenge was presented. Similarly, in *U.S. v. National Treasury Employee's Union*, 513 U.S. at 467 n. 11, this Court noted that even a teacher's

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tips the scale in favor of governmental defendants. *Connick*, 461 U.S. at 152.

persistent advocacy in favor of a school board's action would lack protection if the government employer could demonstrate sufficient workplace disruption. The Sixth Circuit failed to follow *Pickering* and *Connick* by merging the threshold legal issue of whether the conceded disruption rendered Cockrel's curricular expressions unprotected with the factual issue of the alleged motivations of the Petitioners below. This conflicts with *Connick* and review is warranted on this alternative basis.

III. THE DECISION BELOW CONFLICTS WITH THE *MOUNT HEALTHY* CAUSATION STANDARD IN THE SUMMARY JUDGMENT CONTEXT

Cockrel's Complaint challenged the termination of her employment, alleging that it was impermissibly based on her exercise of protected expressive activities. There was no dispute of fact on the summary judgment record below that as of the filing of Petitioners' motion for summary judgment, Cockrel's tenured contract had been terminated on grounds of insubordination, conduct unbecoming a teacher, inefficiency, incompetency, and neglect of duty. There is no dispute that Respondent, Superintendent Leon Mooneyhan, reported the letter effecting Cockrel's termination to the Kentucky Education Professional Standards Board which ordered the surrender of Cockrel's teaching certificate retroactively to June 30, 1997, through June 30, 1999, and the suspension of her certificate for two (2) years (July 1, 1999, through June 30, 2001).

The matter of causation in Section 1983 constitutional tort cases is governed by this Court's decision in *Mount*

Healthy Bd. of Ed. v. Doyle, 429 U.S. 274 (1977). Under *Mount Healthy*, it is the employee's task to adduce evidence which would support a finding that constitutionally protected conduct was a motivating factor in the challenged decision and the employer is insulated from liability upon such a showing if it can demonstrate the same decision would have been made even in the absence of the protected conduct.

Here, in assessing Cockrel's initial burden under *Mount Healthy* (App., p. 33-34), the Sixth Circuit simply failed to consider the unchallenged termination for cause and the surrender and suspension of Cockrel's teaching certificate. Rather, the decision summarizes Respondent's proof by stating, "there certainly is significant evidence that Cockrel's behavior at school, apart from the industrial hemp presentations, was often inappropriate . . . ." (App., p. 33.) Causation is an essential element of a constitutional tort case arising under 42 U.S.C. § 1983. *See Mount Healthy*. The applicable substantive law determines what facts are material for purposes of a summary judgment motion. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Moreover, under Fed.R.Civ.P. 56, a court must review the record, "taken as a whole." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Given Cockrel's termination for cause, as well as her statutory ineligibility to teach by virtue of the surrender of her certificate effective as of a date preceding her termination, no material issue of fact was presented below even as to Cockrel's initial *Mount Healthy* burden.

With respect to the Petitioners' burden of rebuttal under *Mount Healthy* in the summary judgment context,

the Sixth Circuit held that judgment for Respondents would be proper "only if the evidence is such that *every* reasonable juror would conclude that the Defendants have met their burden of showing that Cockrel would have been terminated even had she not spoken to her class about the merits of industrial hemp." (Emphasis in original.) (App., p. 36.) In *Anderson*, this Court noted that the summary judgment standard mirrors the "reasonable jury" standard under Fed.R.Civ.P. 50(a) and requires judicial assessment of a "fair minded jury." *See, also, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). Even though Petitioners shouldered the *Mount Healthy* rebuttal burden, such should have been assessed against a fair minded jury as a collective, *i.e.*, could a fair minded jury fail to find in favor of Petitioners? *Cf. Anderson*, 477 U.S. at 252. The Sixth Circuit's "every reasonable juror" rule set forth an overly rigorous summary judgment standard under *Anderson, Mount Healthy*, and by analogy, Fed.R.Civ.P. 50(a).

Further, the Sixth Circuit states, with respect to the Petitioners' burden on rebuttal, that "we must be confident that defendant's decision to terminate the plaintiff was not based in part upon the plaintiff's decision to speak." (App., p. 42.) Clearly this cannot be squared with *Mount Healthy* which specifically provides that governmental defendants can prevail notwithstanding that the record admits a finding of fact that the challenged decision was motivated in part by the challenged conduct. *See, Mount Healthy*, 529 U.S. at 286 (public employer is not precluded from taking adverse personnel action "simply because the protected conduct makes the employer more certain of the correctness of its decision").

In contrast with its assessment of the Respondent's initial *Mount Healthy* burden, the Sixth Circuit acknowledged Cockrel's termination for cause in analyzing Petitioners' burden of rebuttal, stating "we have no doubt that conduct of this nature can serve as adequate grounds for an employee's termination." (App., p. 36.) The Sixth Circuit characterizes the statutorily mandated grounds for termination, *see* KRS 161.790(1) (Michie 1996) (App., p. 61), as "proffered" grounds (App., p. 2). However, when Cockrel declined to exercise her right to a full blown due process hearing on the charges, such stand as the actual grounds for termination under state law. *See* KRS 161.790(1); (3) (App., pp. 61-62.) Further, the decision below again ignores the surrender and suspension of Cockrel's teaching certificate in a separate central state administrative proceeding arising from the superintendent's report of the letter effecting the challenged termination. Cockrel conceded her ineligibility to teach in any Kentucky school district as of a date prior to her termination. No reasonable jury could fail to conclude that Cockrel would have been terminated even in the absence of the purportedly protected activity. *Cf. Reeves*, 530 U.S. at 148. At a minimum, the Sixth Circuit erred in failing to give due consideration to Cockrel's unchallenged termination for cause and the loss of her certification to teach in its *Mount Healthy* causation analysis.

The Sixth Circuit's *Mount Healthy* analysis conflicts with this Court's decisions as argued hereinabove and this Court is respectfully urged to exercise its certiorari jurisdiction to correct the decision below and clarify the law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DONNA COCKREL, *Plaintiff-Appellant,*	
v.	No. 00-5259
SHELBY COUNTY SCHOOL DISTRICT, et al., *Defendants-Appellees.*	

Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.
No. 98-00040 – Joseph M. Hood, District Judge.

Argued: March 9, 2001

Decided and Filed: November 9, 2001

Before: SILER, MOORE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Matthew L. Mooney, MOONEY, MOONEY & MOONEY, Lexington, Kentucky, for Appellant. Robert L. Chenoweth, CHENOWETH LAW OFFICE, Frankfort, Kentucky, for Appellees. **ON BRIEF:** Matthew L. Mooney, Eugene F. Mooney, James M. Mooney, MOONEY,

MOONEY & MOONEY, Lexington, Kentucky, for Appellant. John C. Fogle III, CHENOWETH LAW OFFICE, Frankfort, Kentucky, for Appellees.

MOORE, J., delivered the opinion of the court, in which CLAY, J., joined. SILER, J. (pp. 36-37), delivered a separate concurring opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff Donna Cockrel ("Cockrel") appeals the district court's decision granting the Shelby County Public School District ("School District" or "District"), Superintendent Leon Mooneyhan, and Principal Bruce Slate's (collectively referred to as "defendants") motion for summary judgment with respect to Cockrel's First Amendment retaliation claim, which she brought pursuant to 42 U.S.C. § 1983. We **REVERSE** and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff Donna Cockrel, a tenured fifth-grade teacher at Simpsonville Elementary School in the Shelby County, Kentucky School District was terminated on July 15, 1997 by the District's superintendent, Dr. Leon Mooneyhan. The School District's proffered grounds for Cockrel's termination were insubordination, conduct unbecoming a teacher, inefficiency, incompetency, and neglect of duty. As the basis for these charges, the School District detailed

seventeen specific instances of misconduct engaged in by Cockrel, including: failing to teach and disparaging the school's "Just Think" curriculum; calling Principal Harry Slate names in front of staff members and students; and failing to cooperate with the Title I program and the Title I aides in her class, as well as with other faculty members and staff of Simpsonville Elementary School.

While the School District alleged numerous reasons for its decision to terminate Cockrel, she claims that the District fired her due to her decision to invite Woody Harrelson, the television and film actor most famous for his role as "Woody" on the network television show "Cheers," and others to her classroom to give presentations on the environmental benefits of industrial hemp. Hemp, an illegal substance in Kentucky, Ky.Rev.Stat. §§ 218A.1422, 218A.010(14), is a plant from which both marijuana and a valuable fiber can be harvested. There are two varieties of the hemp plant. One is the marijuana plant itself, with approximately four to seven percent of its weight comprised of tetrahydrocannabinol ("THC"), the active chemical in the marijuana drug; the other is industrial hemp, a plant which grows in stalks and from which fibers can be taken to make various goods such as paper and clothes. John Mintz, *Splendor in the Grass?*, Washington Post, Jan. 5, 1997, at H1. Unlike marijuana, the industrial hemp plant is only comprised of between 0.1 and 0.4 percent THC, an insufficient amount to have any narcotic effect. *Id.* Nevertheless, Kentucky law prohibits possession of both varieties of the hemp plant, including "its seeds or resin or any compound, mixture, or preparation which contains any quantity of these substances." Ky.Rev.Stat. §§ 218A.1422, 218A.010(14).

Cockrel claims that on at least three occasions during her seven-year tenure at Simpsonville Elementary she organized outside speakers to come to her class to speak about industrial hemp. Cockrel further claims that both Principal Slate and Superintendent Mooneyhan knew that she organized industrial hemp presentations. While Principal Slate alleges that he never knew industrial hemp was being discussed in Cockrel's class, he does admit that Cockrel's lesson plans, on at least one occasion, specifically mentioned that hemp was to be discussed.

On or about April 9, 1996, following Cockrel's decision to end the 1995-96 school year with a project entitled "Saving the Trees," in which the use of industrial hemp fibers as a possible alternative to wood pulp was to be discussed, Cockrel was contacted by a representative of the Cable News Network ("CNN") and asked if she would permit CNN's cameras to film her class presentation for use in a larger program on tree conservation. Cockrel claims that she then immediately informed Slate of CNN's potential visit to their school, though Slate does not recall this conversation.

In early May 1996, Joe Hickey, president of the Kentucky Hemp Growers Association, informed Cockrel that Woody Harrelson might visit Kentucky with CNN, and that Harrelson might also visit her classroom. Cockrel claims that she was given no specific information as to when Harrelson might visit her classroom, and that it was not until the morning of May 30, 1996, the last day of the school year, that she was notified that Harrelson would be visiting Simpsonville Elementary School that day. Cockrel informed Principal Slate of the impending visit, and he agreed to allow it, though Slate claims that he was

only told that the presentation to be given was about agriculture.

Harrelson arrived at the school later that morning with an "entourage, including representatives of the Kentucky Hemp Museum and Kentucky Hemp Growers Cooperative Association, several hemp growers from foreign countries, CNN, and various Kentucky news media representatives." Appellant's Br. at 4-5. As stated in Cockrel's complaint, Harrelson spoke with the children about his opposition to marijuana use, yet he distinguished marijuana from industrial hemp and advocated the use of industrial hemp as an alternative to increased logging efforts. As part of the presentation, products made from hemp were shown to the children, as were hemp seeds, a banned substance in the state of Kentucky. Harrelson's visit received both local and national media attention. One student who did not have parental permission to be videotaped or photographed by the news media was included by the press in a class photograph with Harrelson.

Following Harrelson's visit and the media attention it garnered, parents and teachers wrote numerous letters to members of the Shelby County School District voicing their concern and dismay regarding the industrial hemp presentation. Several of the letters noted the mixed message the school was sending on drug use as Harrelson's presentation occurred on the same day that many Simpsonville Elementary School students were graduating from the Drug Abuse Resistance Education ("D.A.R.E.") program offered in the school.

Based on the complaints expressed in the letters, Superintendent Mooneyhan decided to initiate an investigation into Cockrel's conduct. Following the investigation, Mooneyhan advised the Kentucky Education Professional Standards Board ("EPSB") that Cockrel had allowed hemp seeds, an illegal substance, to be passed around to students in her class during Harrelson's class visit. The Standards Board, after investigating the matter, ultimately dismissed Mooneyhan's complaint without prejudice, stating that there was an "insufficient basis to warrant [a] certificate revocation action."[1] Joint Appendix ("J.A.") at 288 (EPSB Letter to Cockrel).

In the months following Harrelson's visit, Simpsonville Elementary School adopted a new visitors policy for "controversial" topics that required advance approval by school administration and written consent by students' parents. This policy was put to use when, during the next school year, Cockrel informed Slate that Harrelson would be making a second visit to her classroom to discuss industrial hemp. Cockrel met all of the requirements of the new visitors policy, including providing the requisite

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[1] On September 3, 1996, based on the findings of the investigation, Mooneyhan gave Cockrel a private reprimand both for her conduct during the Harrelson visit and for other inappropriate actions that were discovered. The criticisms specifically pertaining to Harrelson's visit, which were also listed as reasons for her eventual discharge, included: allowing hemp seeds to be passed around to her students; allegedly lying to the administration about when she first learned Harrelson would be coming to visit; failing to have all the visitors associated with the hemp presentation register at the school office; and allowing a student to be photographed by the media without parental permission.

advance notice to Principal Slate and obtaining permission from the parents of her students for their children to attend the presentation.[2] Slate did not attempt to discourage Cockrel from having another class presentation on industrial hemp, nor did he tell her that Harrelson should not be invited back to the school. According to Cockrel, however, Superintendent Mooneyhan did tell her earlier in the school year that it would not be in her best interests if Harrelson made any more visits to her class. While Harrelson was unable to attend on the day of his scheduled visit, a small group of parents, unaware that Harrelson was not coming, went to the school and "loudly voiced their objections" to Slate about his permitting Harrelson to visit the school a second time. J.A. at 182 (Slate Dep.).

Harrelson rescheduled the visit for the following week, January 29, 1997, and Cockrel again fully complied with the school's visitors policy. Principal Slate again approved Harrelson's visit. This time Harrelson did make an appearance. Harrelson was met by a group of parents outside the school who were protesting his visit. Due to school scheduling problems, Harrelson was only able to speak to the students for a few minutes before the students had to leave for lunch. Harrelson's visit again garnered national media attention from CNN. Principal Slate, who had been asked by CNN for an interview regarding Cockrel's presentations on industrial hemp, chose to issue a written statement instead. In his statement, Slate said the following:

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[2] All but one of her students was given permission to attend the Harrelson presentation.

> The media has reported that Ms. Cockrel has experienced problems with Shelby County school officials, including me, regarding her teaching about industrial hemp. I admit that we have had problems, however, not all our concerns are about Ms. Cockrel's teaching about hemp. I have also received complaints about her conduct in other areas. The Shelby County school officials and I do not disapprove of Ms. Cockrel teaching about hemp, *per se*, which we admit has educational value as to its historical and current uses and its potential as an alternative crop. Rather, we have been concerned about the methods Ms. Cockrel has used to present issues regarding hemp to her students.

J.A. at 265 (Statement for CNN) (emphasis in original). Slate's statement then went on to criticize Cockrel's permitting hemp seeds to be passed around to the students at the first presentation, as well as her failure to inform him promptly of Harrelson's first visit, which occurred on the same day as the D.A.R.E. graduation.

In the months following Harrelson's initial visit, and shortly after his second visit in January 1997, Slate sat in on Cockrel's class for purposes of conducting evaluations. That school year, Cockrel was the only tenured teacher at Simpsonville Elementary to be reviewed after two years, whereas tenured teachers in the School District are typically reviewed only once every three years. Slate stated in his deposition that the reason for Cockrel's early review was his perception that things had been "going downhill" between the two of them for the previous two years. J.A. at 159 (Slate Dep.). Slate further explained that Cockrel was neither communicating nor cooperating with him and the rest of the staff and faculty of Simpsonville

Elementary, nor was she adequately following the school's curriculum and policies.

Citing examples of this downward trend in Cockrel's attitude and performance, Slate testified that Cockrel did not want Deputy Yeager, the police officer in charge of the D.A.R.E. program at Simpsonville who had spoken out against the Harrelson visits, in her classroom instructing her students. She asked Slate to find someone else to teach the D.A.R.E. program. Slate further stated that two teachers had approached him to let him know that Cockrel was calling him names outside his presence. In addition, a parent notified Slate that her child had heard Cockrel call Slate a name in class. Slate also noted that there were many times when Cockrel simply refused to speak with him or failed to attend meetings.

In the 1996-97 school year, during and after the news that Harrelson would be visiting her class once again, five students, at their parents' request, were transferred out of Cockrel's class. Each time Slate attempted to inform Cockrel of a student's transfer, Cockrel would refuse to talk with him, sometimes walking right past him when he tried to speak with her, or turning her back to him, or refusing to meet with him in his office when he so requested.

On February 20, 1997, in the wake of Cockrel's decision to continue discussing the benefits of industrial hemp with outside speakers, the Simpsonville Parent Teachers Association ("PTA") adopted a "position statement," which stated, in part:

> In our opinion, Mrs. Cockrel's behavior over the past few months has been inappropriate for a

> teacher and role model for our children. We feel she violated the professional code of ethics for KY. [sic] school personnel. In our opinion, she can no longer be an effective educator in our system and our children's education would be better served by another teacher.

J.A. at 291 (PTA Position Statement). A little more than a month later, Principal Slate issued a "summative evaluation" of Cockrel's performance, stating that Cockrel did not meet the requisite level of performance in five of the forty-three categories of evaluation. Deficient performance was noted in the following areas: communication with parents regarding student performance and teacher expectations; documentation of lesson plans; showing "consistent sensitivity to individual academic, physical, social, and cultural differences and respond[ing] to all students in a caring manner"; ability to build positive relationships within the school and between the school and community; and acting in accordance with laws and with school regulations and procedures. J.A. at 292-97 (Performance Evaluation, Mar. 26, 1997). Attached to the evaluation were several letters from parents complaining about Cockrel's discussion of hemp in class, as well as documentation of other alleged misconduct. Based on this evaluation, Slate recommended to Superintendent Mooneyhan that Cockrel be terminated. Cockrel was terminated by Mooneyhan on July 15, 1997.

The termination letter informing Cockrel of her discharge detailed numerous instances of misconduct, all of which allegedly served as the basis for her discharge. Several of these charges detailed misconduct that occurred well before Harrelson made his initial visit to

Simpsonville Elementary. There is no evidence in the record, however, that Cockrel had been reprimanded for such activity prior to Harrelson's visits to her classroom.

As is her right under Kentucky law, Cockrel initially decided to appeal the Superintendent's decision to terminate her. Shortly thereafter, however, she withdrew her appeal.

Pursuant to Ky. Rev. Stat. § 161.120, Superintendent Mooneyhan forwarded on to the EPSB the proffered reasons for terminating Cockrel in case the Board wished to revoke Cockrel's teaching certificate. Following review by the EPSB, Cockrel entered into a written agreement whereby her teaching certificate was surrendered for two years (June 1997 to June 1999) and suspended for two years (July 1, 1999 through June 30, 2001). The agreement stated, in part:

> While Cockrel denies any wrongdoing and further denies that her conduct is in any way a violation of KRS 161.120 and/or the Professional Code of Ethics for Kentucky School Personnel, she agrees that the evidence, when presented at formal hearing, is such to result in a finding on all charges that her conduct is in violation of KRS 161.120, and the Professional Code of Ethics for Kentucky School Personnel. Therefore, Cockrel believes that it is in her best interest at this time to enter into this Agreed Order.

J.A. at 68-69 (EPSB Agreed Order).

On June 4, 1998, Cockrel filed suit in the United States District Court for the Eastern District of Kentucky. Cockrel brought a claim pursuant to 42 U.S.C. § 1983 in which she alleged that she was terminated in retaliation

for exercising her First Amendment right of free speech when discussing the potential environmental benefits of industrial hemp. Cockrel also included a state law breach of contract claim. Following limited discovery, the defendants moved for summary judgment on Cockrel's § 1983 claim and asked that the district court abstain from deciding her state law claim of breach of contract.

The district court agreed to abstain from deciding Cockrel's state law breach of contract claim. As for Cockrel's First Amendment retaliation claim, the district court granted the defendants' motion for summary judgment. In doing so, the district court held that Cockrel's decision to bring in a speaker to discuss industrial hemp constituted conduct that was neither expressive nor intended to convey a particularized message, and thus was not considered protected speech under Supreme Court jurisprudence. The district court further held that Cockrel's decision to discuss industrial hemp as part of the fifth-grade curriculum could be considered nothing more than private speech by a teacher who was communicating in her role as an employee, not as a citizen, and thus did not touch on matters of public concern. Ultimately, the district court concluded that because Cockrel's conduct could not even be considered expressive speech, and because, even if it was speech, her curricular choices did not touch on matters of public concern, she did not have a First Amendment right to discuss industrial hemp in her classroom. Thus, because she had no First Amendment right to speak in this instance, the court concluded that Cockrel had no actionable First Amendment retaliation claim. Cockrel's appeal to this court followed.

II. ANALYSIS

We must first address two procedural arguments raised by the appellees that, if successful, would render a review of the merits of Cockrel's First Amendment retaliation claim unnecessary.

A. Collateral Estoppel

The defendants first argue that, because Cockrel failed to appeal the Superintendent's decision to terminate her, as was her right under Kentucky law, she is collaterally estopped from challenging her dismissal in this court. As this circuit has explained, collateral estoppel, otherwise known as issue preclusion, "refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Barnes v. McDowell*, 848 F.2d 725, 728 n.5 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989). The *Barnes* court further explained that federal courts must give the factual findings of a state agency that is acting in a judicial capacity preclusive effect if such findings would have preclusive effect in the State's courts. *Id.* at 730 (citing *University of Tennessee v. Elliott*, 478 U.S. 788, 796-98 (1986)). Kentucky courts give preclusive effect to factual findings in a previous proceeding " 'only as to matters which were necessarily involved and determined in the former action," as opposed "to matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment.' " *Barnes*, 848 F.2d at 730-31 (quoting *Sedley v. City of West Buechel*, 461 S.W.2d 556, 558 (Ky. 1970)).

In this case, the question of whether Cockrel was terminated in retaliation for the exercise of her First Amendment rights was not resolved by any prior state proceeding. As Cockrel notes in her reply brief, "[t]here was no hearing on any issue involved in this action. There are no state court or administrative findings on any factual matters involved here." Appellant's Reply Br. at 13. Even if the appeals board had decided that the reasons proffered by the defendants for Cockrel's discharge were adequate to support the termination and that there was substantial evidence of defendants' proffered reasons in the record, unless Cockrel raised her retaliation claim, it would not have decided, nor even considered, whether the true motivation of defendants' actions was to retaliate against her for exercising her free speech rights. *See Barnes*, 848 F.2d at 731. Thus, because Cockrel's First Amendment retaliation claim was not addressed in any prior proceedings, issue preclusion does not prevent her federal suit. *Id.*

B. Cockrel's Motion to Reconsider

As defendants note in their brief, Cockrel failed to respond to their motion for summary judgment within the requisite time period.[3] The district court, without

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[3] The defendants filed their motion for summary judgment by mail on December 30, 1999, thus giving Cockrel eighteen days to file her response (*i.e.*, the fifteen days to respond allotted by local rules of the Eastern District of Kentucky plus three additional days pursuant to Fed. R. Civ. P. 6(e) because she was served with the motion by mail). Thus, Cockrel's response was due by January 17, 2000. On January 18, 2000, Cockrel's attorney obtained defense counsel's agreement that time be enlarged an

benefit of any response by plaintiff, issued its memorandum and order granting defendants' motion for summary judgment on January 28, 2000. On February 2, 2000, Cockrel filed a motion with the district court asking it to reconsider and set aside the issuance of its order granting summary judgment in light of the parties' agreement to enlarge time an additional thirty days so that plaintiff could respond to defendants' motion for summary judgment. The district court denied this motion, stating that "[i]t remains clear to this Court that Plaintiff's selection of industrial hemp as part of her classroom curriculum is not a form of speech entitled to protection by the First Amendment." J.A. at 41 (Dist. Ct. Order, Feb. 14, 2000). The court further stated that, in light of the law discussed in its memorandum granting summary judgment, "[p]ermitting Plaintiff to file a belated response would be an exercise in futility." J.A. at 42.[4]

Motions for reconsideration filed within ten days of the district court's final judgment, as this one was, are generally treated as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). 12 James Wm.

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additional thirty days to respond to the defendants' motion. Nevertheless, by the time Cockrel's counsel could put the agreement in writing and circulate it to opposing counsel for his signature, the district judge, on January 28, 2000, issued his ruling on the motion for summary judgment.

[4] Although Cockrel did not submit arguments on the merits of her claims in her motion to reconsider, the district court did not fault her for this omission. Instead, the sole basis for its denial of Cockrel's motion was the futility of her claims in light of the court's prior legal conclusion that Cockrel's decision to teach her students about industrial hemp was not protected speech under the First Amendment.

Moore et al., Moore's Federal Practice § 59.30[7] (3d ed. 2000). While this court generally reviews the denial of a Rule 59(e) motion to alter or amend a judgment for an abuse of discretion, a de novo standard of review is applied when the Rule 59(e) motion seeks review of a grant of summary judgment. *Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 289 (6th Cir. 1999).

Indeed, because the district court was not exercising its discretion in refusing to allow Cockrel's response, but instead was stating, as a matter of law, that any response by the plaintiff would be futile, we apply a de novo standard of review to this legal conclusion. We now turn to the merits of the case in order to evaluate the district court's finding of futility. As will be discussed later, not only is it clear that Cockrel's decision to bring in speakers advocating the use of industrial hemp is protected speech under the First Amendment, but her First Amendment retaliation claim is strong enough to survive the defendants' motion for summary judgment. Thus, the district court's denial, on futility grounds, of Cockrel's Rule 59(e) motion to reconsider its judgment was error.

C. Cockrel's First Amendment Retaliation Claim

1. Standard of Review

This court reviews de novo a district court's decision to grant summary judgment. *Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 246 (6th Cir. 2000). Summary judgment may be granted only if there are no genuine issues of material fact and one party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). A dispute over a material fact cannot be "genuine" unless a reasonable

jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In reviewing the district court's decision to grant summary judgment, we view all the facts and the inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

2. The Elements of a First Amendment Retaliation Claim

Donna Cockrel, a teacher in the Shelby County Public School District, is a public employee. For a public employee to establish a claim of First Amendment retaliation, this court has held that she must demonstrate:

> (1) that [she] was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused [her] to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of [her] constitutional rights.

Leary v. Daeschner, 228 F.3d 729, 737 (6th Cir. 2000). To demonstrate that she was engaging in constitutionally protected speech, Cockrel must show that her speech touched on matters of public concern, and that her "interest in commenting upon matters of public concern . . . outweigh[s] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (quotation omitted); *see also Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 144 (6th Cir. 1997) (same). If the plaintiff can establish the three

elements of her First Amendment retaliation claim, the burden of persuasion then shifts to the defendants, who must show, by a preponderance of the evidence, that they "would have taken the same action even in the absence of the protected conduct." *Leary*, 228 F.3d at 737 (quotation omitted).

a. Was This Speech?

Before deciding whether Cockrel's speech was constitutionally protected, this court must first address the question of whether Cockrel's activity can be considered speech at all. The district court's decision disposing of Cockrel's First Amendment claims appears to be based on two separate theories that the court uses interchangeably. First, the district court stated that Cockrel's decision to bring in a speaker who would give a presentation on industrial hemp should not be considered speech. The district court further held that a teacher's decisions regarding the content of the curriculum she will teach to her class, even if considered speech, is still not protected by the First Amendment. We put the second holding aside for a moment and turn to the first.

The district court held that, because Cockrel simply chose to bring in speakers who would talk about industrial hemp, rather than speaking on the matter herself, "[h]er free speech claim is based solely on conduct." J.A. at 31 (Dist.Ct.Mem.Op.). Also influential in the district court's decision was its notion that, in staging an industrial hemp presentation, Cockrel was not intending

to convey a "particularized message," nor was she advocating or speaking against hemp's use as an environmental alternative to cutting down trees. J.A. at 35 (Dist.Ct.Mem.Op.) (quotation omitted).

Regardless of the reasoning upon which it relied, the district court erred in holding Cockrel's conduct not to be speech. First, to the extent the district court was persuaded that Cockrel's actions did not constitute speech because Woody Harrelson, rather than Cockrel, was doing the speaking, this was error. As the Supreme Court stated in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 570 (1995), to receive First Amendment protection, a speaker does not have "to generate, as an original matter, each item featured in the communication." For example, cable operators, even though they only broadcast material written, spoken, and produced by others, are still considered to be engaged in protected speech. *Id.* (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994)). The same First Amendment protections exist for newspapers, which in their opinion pages simply collect and present the speech of others. *Hurley*, 515 U.S. at 570. We see no reason, nor have the defendants explained to this court, why a teacher's selection of a speaker for an in-class presentation is less a form of speech than a cable operator's decision as to which programs it chooses to present to its viewing audience.

To the extent that the district court relied on the argument that Cockrel's conduct was not speech because she had no advocative purpose when bringing industrial hemp enthusiasts to her class, this was also error. The Supreme Court has held that films, radio programs, and

live entertainment are all protected by the First Amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). Moreover, to have constitutional protection, those who choose to show the film or stage the play need not show that they intended to convey a particularized message in doing so, nor that they approved or disapproved of its content, for such activities are inherently expressive and entitled to constitutional protection. *Id.*

The district court points to Judge Milburn's concurring opinion in *Fowler v. Board of Education*, 819 F.2d 657 (6th Cir.), *cert. denied*, 484 U.S. 986 (1987), in support of its argument that Cockrel's conduct should not be considered speech. In *Fowler*, a high school teacher, at the request of her students, showed them *Pink Floyd – The Wall*, an "R"-rated film containing nudity and a great deal of violence, on the last day of school while she completed grade cards. *Id.* at 658-59. The teacher was later terminated for showing the film. The teacher then brought suit, claiming that she was terminated in retaliation for exercising her First Amendment rights.

Judge Milburn, writing only for himself on the issue of whether the conduct of showing the film to the class constituted protected speech, stated that, because the teacher had never seen the movie before and had no idea of its content, her decision to show the film could not be considered "expressive or communicative" in nature. *Id.* at 662-64. Thus, Judge Milburn concluded, the teacher's conduct in showing the film was not entitled to First Amendment protection. *Id.*

Judges Peck and Merritt disagreed with Judge Milburn's analysis of whether the teacher's showing of a film

could be considered speech. *Id.* at 667, 669-70. Judge Peck, while concurring in the outcome of the case, stated that the expressive conduct cases used by Judge Milburn to analyze the teacher's showing of the film were "inapposite." *Id.* at 667. Judge Merritt, noting that books, movies, and music that are purely for entertainment value still receive First Amendment protection, argued that the teacher's decision to show the film clearly was protected speech. *Id.* at 669-70.

While Judge Milburn's analysis in *Fowler* is not binding on this court, even if it were, the facts of this case are clearly distinguishable from *Fowler.* Unlike the teacher's showing of a film the content of which she knew nothing about, Cockrel's decision to bring in industrial hemp advocates did have an intent to convey a particularized message. Cockrel, who in her complaint states that "[s]he was a teacher trainer in the state sponsored Kentucky Agriculture and Environment in the Classroom project from 1993 to 1997 [,]" worked at designing methods to integrate agricultural topics into her fifth-grade curriculum. J.A. at 9 (Compl.). She had, on at least three occasions before the Harrelson visit, brought in speakers who advocated the use of industrial hemp to conserve trees and other natural resources. Viewing the facts in the light most favorable to Cockrel, we cannot state, as the district court did, that it was not until "some point during or after the presentation [that] Plaintiff may have developed an approval or disapproval of the use of industrial hemp[.]" J.A. at 36-37 (Dist. Ct. Mem. Op.). Instead, the evidence shows that Cockrel was well aware of the arguments for industrial hemp, and that this was a message she wanted delivered to her students.

Thus, while we believe that Cockrel had an advocative purpose in bringing in speakers who presented her students with information on the environmental benefits of industrial hemp, even if Cockrel did not have such a purpose when organizing these presentations, her decision to present these speakers to her class still constitutes speech.

b. Is Cockrel's Speech Constitutionally Protected?

Given our determination that Cockrel's decision to bring industrial hemp advocates into her class is speech, the next question we must ask is whether that speech is constitutionally protected. As stated earlier, speech of a public employee is protected by the First Amendment only if it touches on matters of public concern, and only if "the employee's interest in commenting upon matters of public concern . . . outweigh[s] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Leary*, 228 F.3d at 737 (quotation omitted). If Cockrel's speech cannot meet both of these standards, then her First Amendment retaliation claim cannot go forward.

i. Does Cockrel's Speech Touch on a Matter of Public Concern?

In determining whether Cockrel's speech touched on a matter of public concern, we turn to *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court's most instructive

case on this issue. In *Connick*, the Court stated that matters of public concern are those that can "be fairly considered as relating to any matter of political, social, or other concern to the community[.]" *Id.* at 146. There is no question that the issue of industrial hemp is a matter of great political and social concern to many citizens of Kentucky, and we believe that Cockrel's presentations clearly come within the Supreme Court's understanding of speech touching on matters of public concern.

In support of this conclusion, we first turn to the district court's opinion, which unequivocally stated "that the issue of industrial hemp is politically charged and of great concern to certain citizens." J.A. at 36 (Dist. Ct. Mem. Op.). Second, in the past year alone, industrial hemp advocacy in Kentucky has made news on several occasions, revealing the significant extent to which industrial hemp has become an important and publicly debated issue in the State. In October, presidential candidate Ralph Nader, in a campaign stop in Kentucky, spoke out in favor of the legalization of industrial hemp and of the benefits it would have for small family farmers. Al Cross, *Nader Blasts Foes in Visit to Louisville*, The Courier-Journal (Louisville, KY), Oct. 12, 2000, at A1. In December, after the Drug Enforcement Agency confiscated industrial hemp being grown on the Pine Ridge, South Dakota Indian Reservation, members of the Kentucky Hemp Growers Association, including former Kentucky governor Louie B. Nunn, traveled to South Dakota and, in a ceremony at the base of Mount Rushmore, delivered legally imported industrial hemp to the tribe as a sign of its solidarity. David Melmer, *Kentucky Hemp Farmers Aid Pine Ridge, S.D., Indians After Crop Destruction*, Knight-

Ridder Trib. Bus. News, Dec. 11, 2000. These examples only scratch the surface of the extent to which industrial hemp has become an issue of contentious political and economic debate in Kentucky.

While discussion of industrial hemp plainly meets the broad concept of "public concern" as defined by the Supreme Court, some courts have focused on other portions of the Supreme Court's *Connick* decision in concluding that a teacher's classroom speech does not touch on matters of public concern. *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir.) (en banc), *cert. denied*, 525 U.S. 813 (1998); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 797-99 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). These cases pay particular attention to the following portion of the *Connick* Court's holding:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147. Based upon this language, the Fourth and Fifth Circuits have determined that a teacher, in choosing what he will teach his students, is not speaking as a citizen, but rather as an employee on matters of private interest. *Boring*, 136 F.3d at 368-69; *Kirkland*, 890 F.2d at 800.

We believe that the Fourth and Fifth Circuits have extended the holding of *Connick* beyond what the Supreme Court intended. Under the courts' analyses in

Boring and *Kirkland*, a teacher, regardless of what he decides to include in his curriculum, is speaking as an employee on a private matter. *Boring*, 136 F.3d at 368-69; *Kirkland*, 890 F.2d at 800. This essentially gives a teacher no right to freedom of speech when teaching students in a classroom, for the very act of teaching is what the employee is paid to do. Thus, when teaching, even if about an upcoming presidential election or the importance of our Bill of Rights, the Fourth and Fifth Circuits' reasoning would leave such speech without constitutional protection, for the teacher is speaking as an employee, and not as a citizen.

The facts in *Connick* indicate that the Fourth and Fifth Circuits have read the Supreme Court's language too broadly. In *Connick*, an assistant district attorney, following a disagreement with a supervisor, prepared a questionnaire seeking the opinions of her co-workers on issues such as "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Connick*, 461 U.S. at 141. Connick was later fired for circulating the questionnaire on the grounds of insubordination. *Id.* The Court held that, while many of the questions simply reflected the plaintiff's efforts to gather information to use against her supervisors in her private employment dispute, Myers's question regarding the pressure to work on political campaigns *did* touch on a matter of public concern. *Id.* at 149. Thus, the Court held that, even though Myers was speaking as an employee out of her private interest in combating her supervisors' decision to transfer her, the fact that

one of her questions dealt with the fundamental constitutional right not to be coerced into campaigning for a political candidate was enough to make this particular issue touch on a matter of public concern. *Id.*

If the Fourth and Fifth Circuits' interpretation of *Connick* were correct, then any time a public employee was speaking as an employee, like Myers was when she asked her question about employees being pressured to campaign, the speech at issue would not be protected. As the Supreme Court made clear in its analysis, however, the key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on matters of public concern. *Id.* 148-49. Thus, even if a public employee were acting out of a private motive with no intent to air her speech publicly, as was the case with Myers, so long as the speech relates to matters of "political, social, or other concern to the community," as opposed to matters "only of personal interest," it shall be considered as touching upon matters of public concern. *Id.* at 146-49.

In Cockrel's case, although she was speaking in her role as an employee when presenting information on the environmental benefits of industrial hemp, the content of her speech, as discussed *supra*, most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest. Thus, contrary to the analyses in *Boring* and *Kirkland*, we hold that Cockrel's speech does touch on matters of public concern.[5]

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[5] While Cockrel, in teaching her students about the environmental benefits of industrial hemp, was arguably

ii. *Pickering* Balancing

Having held that Cockrel's speech touches on matters of public concern, we must now weigh the employee's interest in speaking against the employer's interest in regulating the speech to determine if the speech is constitutionally protected. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court endeavored to strike a balance between a public employee's speech rights on matters of public interest (in that case a public school teacher's speech outside of school) and the State's interest as an employer in maintaining a productive workplace. In accordance with the balancing test created in

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speaking both as an employee and as a citizen, we do not believe that this case is best analyzed as a "mixed speech" case. *See Bonnell v. Lorenzo*, 241 F.3d 800, 811-12 (6th Cir. 2001). In mixed speech cases, the employee at issue speaks not only as both a citizen and an employee, but the content of her speech involves matters of both public and private concern. *See id.* In this case, while the very nature of Cockrel's profession entails that her speech on matters of political and social interest is likely to be made both as an employee and a citizen, the content of her speech is not mixed. Instead, rather than concerning, in part, an employee grievance or some other private dispute, as was the case with the professor's speech in *Bonnell*, Cockrel's speech relates to matters particularly of public concern. Even if we were to apply the mixed speech analysis, so long as "any part of an employee's speech, which contributes to the discharge, relates to matters of public concern, the court must conduct a balancing of interests test as set forth in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)." *Rahn v. Drake Ctr., Inc.*, 31 F.3d 407, 411 (6th Cir. 1994). As we will discuss in more detail later, because Cockrel's speech does relate to matters of public concern, and because this speech, at least in part, contributed to her discharge, a balancing of interests under *Pickering* is in order.

Pickering, public employee speech, even if touching on matters of public concern, will not be constitutionally protected unless the employee's interest in speaking on these issues "outweigh[s] 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Leary*, 228 F.3d at 737 (quoting *Pickering*, 391 U.S. at 568). In striking the balance between the State's and the employee's respective interests, this court has stated that it will "consider whether an employee's comments meaningfully interfere with the performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees." *Williams v. Kentucky*, 24 F.3d 1526, 1536 (6th Cir.), *cert. denied*, 513 U.S. 947 (1994) (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

Before engaging in a "particularized balancing" of the competing interests at stake in this case, *Connick*, 461 U.S. at 150, it is important to note that "if an employee's speech substantially involve[s] matters of public concern, an employer may be required to make a particularly strong showing that the employee's speech interfered with workplace functioning before taking action." *Leary*, 228 F.3d at 737-38 (quotation omitted). In this case, it is clear that Cockrel's speech did substantially involve matters of public concern, and thus the defendants will have to make a stronger showing that their interests in regulating plaintiff's speech outweighed Cockrel's interests in speaking.

Weighing in plaintiff's favor in this analysis is the fact that her speech substantially involved matters of

significant public concern in Kentucky. Defendants claim, however, that their "interest in maintaining loyalty, efficient operation of the schools, and workplace harmony" outweighs the plaintiff's interest in speaking about industrial hemp. Appellees' Br. at 27. We first note that the defendants do not claim that Cockrel's presentations on industrial hemp meaningfully interfered with the performance of her teaching duties. Defendants would have a difficult time making this argument, however, considering they openly acknowledged in a public statement to CNN that there was "educational value" in teaching students about industrial hemp as an alternative crop. J.A. at 265 (Statement for CNN). We further note that defendants' purported interest in "maintaining loyalty" is inapposite in this case. While this circuit has stated that it would consider in its balancing whether employee speech operated to "destroy the relationship of loyalty and trust required of confidential employees[,]" *Williams*, 24 F.3d at 1536, a public school teacher, we believe, is hardly the type of confidential employee the court had in mind. Thus, any loyalty concerns that the defendants may have will not be taken into consideration in our weighing of the competing interests at stake.

Turning to the defendants' proffered interests in an efficient operation of the school and a harmonious work environment, there is evidence that plaintiff's speech has led to problems in both of these areas. For example, following Harrelson's first visit to Simpsonville, numerous members of the school's faculty and staff circulated and or signed letters addressed to school officials criticizing Cockrel's actions in advocating the use of industrial hemp to her students. Cockrel thereafter

expressed her displeasure with her co-workers' sentiments on several occasions. As discussed earlier, following D.A.R.E. officer Yeager's criticism of the Harrelson visits, Cockrel no longer wanted the officer in her classroom instructing her students. Cockrel asked Slate to find a replacement for Yeager as well. Cockrel's termination letter detailed several instances of disputes Cockrel had with co-workers, including an instance in which Cockrel jerked a phone away from a co-worker who had signed one of the letters speaking out against the Harrelson visit, and an incident in which Cockrel told two co-workers "not to waste their breath after they said 'good morning' to [her.]" J.A. at 54, 245-46. At least one of these co-workers had also signed a letter critical of Cockrel's decision to speak about industrial hemp.

Many parents and members of the school community also expressed great concern over Cockrel's decision to invite speakers to her class who advocated the use of industrial hemp. Parents wrote letters to Principal Slate and Superintendent Mooneyhan in opposition to Cockrel's industrial hemp presentations, and a small number came to Simpsonville Elementary to protest on the final two occasions Harrelson was scheduled to visit. In addition, the PTA passed a position statement recommending that Cockrel no longer teach in the Shelby County School District.

Although this evidence of a contentious and periodically disrupted work environment weighs in favor of the defendants, the amount of weight we should give this evidence is an entirely different question. We are troubled by the fact that, whereas school officials gave plaintiff prior approval to host all three of the industrial hemp

presentations at issue in this case, defendants now forward concerns of school efficiency and harmony as reasons supporting their decision to discharge Cockrel. Principal Slate approved all of Harrelson's scheduled visits in advance, and Slate openly stated that he had no problem with Cockrel teaching her students about industrial hemp. Cockrel also met the conditions of the new visitors policy implemented after the initial Harrelson visit, including obtaining the permission of each student's parents before a child could participate in the presentation. We do not believe that defendants can use the outcry within the school community protesting Cockrel's speech, speech that was approved by school officials in advance, as a shield for their decision to discharge her. While ordinarily we would give substantial weight to the government employer's concerns of workplace efficiency, harmony, and discipline in conducting our balancing of the employee's and employer's competing interests, we cannot allow these concerns to tilt the *Pickering* scale in favor of the government, absent other evidence, when the disruptive consequences of the employee speech can be traced back to the government's express decision permitting the employee to engage in that speech.[6]

Accordingly, we hold that, on balance, the defendants' interests in an efficient operation of the school and

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[6] This circuit has noted, with minimal explanation, that an unconstitutional dilemma may exist for a teacher whose controversial speech is approved ex ante by school officials, but used ex post, in the wake of parental and or community dismay with that speech, as the reason for the teacher's discharge. *Stachura v. Truszkowski*, 763 F.2d 211, 213-15 (6th Cir. 1985), *rev'd on other grounds*, 477 U.S. 299, 303-04 (1986).

a harmonious workplace do not outweigh the plaintiff's interests in speaking about the benefits of industrial hemp, an issue of substantial political and economic concern in Kentucky. Thus, because Cockrel's speech touches on matters of public concern and because the balancing of interests under *Pickering* weighs in her favor, her speech is constitutionally protected.[7] We now proceed with an examination of the remainder of the elements of plaintiff's First Amendment retaliation claim.

c. Did the Plaintiff Suffer an Injury as a Result of Her Speech That Would Chill an Ordinary Person From Continuing to Engage in Such Speech?

For the next element of Cockrel's retaliation claim, she must show "that the defendant[s'] adverse action caused [her] to suffer an injury that would likely chill a

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[7] Rather than apply *Pickering*, several circuits have chosen to apply the Supreme Court's analysis of students' in-class speech rights in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), to cases in which teachers' in-class speech rights are at issue. *See Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994), *cert. denied*, 515 U.S. 1160 (1995); *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992). The *Pickering* balancing analysis has been consistently applied to cases of teacher speech in this circuit. *See, e.g., Bonnell*, 241 F.3d at 821 (applying *Pickering* to a college professor's speech); *Leary*, 228 F.3d at 737-38 (applying *Pickering* to elementary school teachers' speech). We see no reason to part from *Pickering* when deciding cases involving a teacher's in-class speech, nor have either of the parties in this case argued that *Pickering* should not apply.

person of ordinary firmness from continuing to engage in that activity[.]" *Leary*, 228 F.3d at 737. There is no question that, by being terminated, Cockrel has suffered an injury that would chill an ordinary person from continuing to engage in speech on the environmental benefits of industrial hemp.

d. Was the Decision to Terminate Cockrel Motivated, at Least in Part, by Plaintiff's Decision to Speak About Industrial Hemp?

The final element of Cockrel's First Amendment retaliation claim requires her to show that defendants' decision to discharge her was motivated, at least in part, by the exercise of her free speech rights. *Id.* This circuit has stated that "the nonmoving party may not rely on the mere fact that an adverse employment action followed speech that the employer would have liked to prevent. Rather, the employee must link the speech in question to the defendant's decision to dismiss her." *Bailey*, 106 F.3d at 145 (citation omitted). In other words, to survive defendants' motion for summary judgment, Cockrel must present sufficient evidence to allow a reasonable fact-finder to conclude, by a preponderance of the evidence, that her speech, at least in part, motivated the defendants to discharge her. *Id.*

Although there certainly is significant evidence that Cockrel's behavior at school, apart from the industrial hemp presentations, was often inappropriate, we believe that Cockrel has presented enough evidence such that a

reasonable jury could find that the defendants, in terminating her, were at least partially motivated by her decision to speak on industrial hemp. Several pieces of evidence work in her favor. First, Principal Slate initiated early evaluations of Cockrel in the 1996-97 school year following Harrelson's first visit to her class on the last day of the 1995-96 school year. In the 1996-97 school year, Cockrel was the only tenured teacher Slate reviewed on a schedule of more than one evaluation for every three years. In addition, based on the parents' and teachers' complaint letters following the initial Harrelson visit, Superintendent Mooneyhan initiated an open-ended investigation into Cockrel's school conduct. Finally, the deposition testimony shows that the March 1997 summative evaluation served as the basis upon which Principal Slate recommended to Mooneyhan that Cockrel be fired, and was also a factor in Mooneyhan's ultimate decision to terminate Cockrel. Attached to this evaluation were several letters from parents and staff critical of Cockrel's decision to teach her students about industrial hemp.

After examining this evidence, we conclude that a jury could find, by a preponderance of the evidence, that the defendants' decision to discharge Cockrel was motivated, at least in part, by her decision to teach her students about industrial hemp. The temporal proximity between the Harrelson visits and Cockrel's series of unscheduled evaluations, as well as the influence the parent and teacher complaints appeared to have on the defendants in the wake of the Harrelson visits, constitute sufficient evidence for Cockrel to establish the causation element of her First Amendment retaliation claim.

3. Rebutting the Plaintiff's First Amendment Retaliation Claim

Because Cockrel has successfully established for purposes of the summary judgment stage the three elements of her First Amendment retaliation claim, the burden of persuasion shifts to the defendants. As stated earlier, to defeat the plaintiff's claim at trial, the defendants must show by a preponderance of the evidence that they would have terminated Cockrel even had she not engaged in constitutionally protected activity. *Leary*, 228 F.3d at 737. To defeat plaintiff's claim on a motion for summary judgment, however, a substantially higher hurdle must be surpassed, particularly where, as is the case here, the moving party bears the ultimate burden of persuasion on this issue at trial. 11 James William Moore et al., Moore's Federal Practice § 56.13[1], at 56-138 (3d ed. 2000) (stating that, if the moving party also bears the burden of persuasion at trial, the moving party's initial summary judgment burden is "higher in that it must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it."). To merit summary judgment in their favor, the defendants may not simply bring forth enough evidence to allow a jury to find that they would have terminated Cockrel regardless of her speech. Rather, in reviewing a motion for summary judgment, we must view the evidence and draw all reasonable inferences in the light most favorable to the nonmoving party, *Matsushita*, 475 U.S. at 587, and "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate

when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). Thus, because plaintiff has established the elements of her claim for First Amendment retaliation, summary judgment for the defendants is proper only if the evidence is such that *every* reasonable juror would conclude that the defendants have met their burden of showing that Cockrel would have been terminated even had she not spoken to her class about the merits of industrial hemp.

In the July 15, 1997 termination letter sent by Superintendent Mooneyhan to Cockrel, seventeen reasons were given as the basis for the school district's decision to discharge her. J.A. at 51-55. Among the litany of reasons offered by the defendants for Cockrel's discharge were: her calling Principal Slate names in front of staff members and students;[8] her failure to teach the school's mandatory "Just Think" curriculum; her persistent failure to follow the school's Title I program; her inappropriate language and displays of anger in class; and her general failure to cooperate with other members of the Simpsonville school community, a point which we have already discussed in detail. There is no question that Cockrel's conduct, if it did in fact occur as the defendants allege, was completely inappropriate. Furthermore, we have no doubt that conduct of this nature can serve as adequate grounds for an employee's termination. Despite this, however, after viewing all the evidence in the record in the light most

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[8] Mooneyhan's letter to Cockrel describes in detail the names of faculty and staff attesting to Cockrel's profanity-laced remarks directed at Slate.

favorable to Cockrel, we do not believe that the defendants have met their significant burden of showing that every reasonable juror would conclude that, even had Cockrel not spoken to her students about industrial hemp, she would have been terminated in any event.

Several pieces of evidence weigh against granting defendants' summary judgment motion. First, Cockrel testified in her deposition that, at the beginning of the 1996-97 school year following Harrelson's first visit to her class, she spoke with Superintendent Mooneyhan about the possibility of Harrelson making a second visit to Simpsonville Elementary. Cockrel claimed that, during the course of this conversation, Mooneyhan told her that it would not be in her best interests if Harrelson made any more visits to her class. J.A. at 104-05 (Cockrel Dep.). While Mooneyhan denies ever making such a statement, Mooneyhan Dep. I at 65, when reviewing defendant's motion for summary judgment, we are required to view the evidence in the light most favorable to Cockrel, the nonmoving party. This, alone, creates a material fact issue over the extent to which defendants' decision to discharge Cockrel was motivated by her decision to bring industrial hemp advocates to class.

Other, more circumstantial, evidence also weighs in favor of allowing Cockrel to proceed to trial on her retaliation claim. As noted earlier, Principal Slate initiated early evaluations of Cockrel in the 1996-97 school year following Harrelson's first visit on the last day of the prior school year. In addition, Superintendent Mooneyhan's decision to conduct an investigation into Cockrel's conduct was based solely on the parents' and

teachers' complaint letters he received following the initial Harrelson visit. There is no evidence in the record that any news of the improper conduct alleged in Cockrel's termination letter, much of which occurred well before Harrelson set foot on the grounds of Simpsonville Elementary, had ever been relayed to the Superintendent before the decision to investigate Cockrel had been made, nor is there any evidence that Cockrel had been disciplined by any school administrator for this conduct before Harrelson arrived on the scene. While many of the allegations made against Cockrel would, if true, amount to serious misconduct on her part, the fact that she was not disciplined for any of this behavior, nor did the Superintendent know of it, until after Harrelson visited and various members of the school community voiced their displeasure with the presentation, leads to a genuine issue of material fact concerning the defendants' assertion that Cockrel would have been fired regardless of her decision to speak on the environmental benefits of industrial hemp.

Also telling is the summative evaluation itself, which Principal Slate testified was the basis upon which he recommended to Mooneyhan that Cockrel be fired, and which Mooneyhan admitted was a factor in his ultimate decision to discharge Cockrel. Mooneyhan Dep. II at 150. As evidence of Cockrel's allegedly deficient performance in several categories of evaluation, Principal Slate attached numerous documents to the evaluation. Among these documents were several letters from staff and parents criticizing Cockrel's decision to speak on industrial hemp, as well as a position statement adopted by the Simpsonville PTA recommending that Cockrel no longer

be permitted to teach at that school based on her conduct associated with the hemp presentations. While in the documents appended to the summative evaluation there is evidence of Cockrel engaging in inappropriate behavio apart from her participation in any industrial hemp presentations, we do not believe that, based on the totality of the evidence in this case, every reasonable juror would conclude that Cockrel would have been terminated notwithstanding her constitutionally protected speech.

The defendants cite to this circuit's decision in *Langford v. Lane*, 921 F.2d 677 (6th Cir. 1991), as support for their contention that they have met their burden of rebutting Cockrel's retaliation claim. We believe, however, that *Langford* is distinguishable. In *Langford*, a nursing home employee was fired after engaging in constitutionally protected activity in speaking about an employment dispute in front of the County Board of Commissioners. *Langford*, 921 F.2d at 678-79. The day before the plaintiff in *Langford* was scheduled to speak, her supervisor (Lane) asked the plaintiff (Langford) to discuss why Langford was so hostile to her (Langford had earlier insulted Lane in front of co-workers) and what Langford planned to say to the Board the next evening. Langford twice refused to engage in discussion, once in front of other employees. After Langford refused to speak with her, Lane asked her supervisor if Lane could fire Langford based on this insubordinate conduct. Lane's supervisor told her that, because he had not witnessed the allegedly insubordinate conduct, he could not make the termination decision for her. Rather than discharge Langford, Lane left a note for Langford to meet with her the following day, the day

Langford was scheduled to speak to the Board. This time Langford did agree to meet with Lane, though Langford asked Lane to postpone their meeting until the day after Langford spoke to the Board. Despite their agreement, Langford failed to attend her scheduled meeting with Lane. Langford was then fired.

On review of the district court's grant of summary judgment to the government employer, this court held that the evidence was strong enough for a reasonable jury to state that the employee's speech motivated, at least in part, the defendant's decision to discharge her. *Id.* at 683. Nevertheless, this court then held that, based on the Langford's "rank insubordination" in insulting Lane in front of co-workers and refusing to discuss her employment dispute with Lane despite Lane's requests to do so, the defendants would have terminated Langford regardless of her protected speech. *Id.* at 683-84.

Although the defendants in the case at bar have as much evidence of insubordination and other misconduct upon which to base their decision to discharge as did the defendants in *Langford,* it is less clear in the current case that the defendants would have fired Cockrel even had she not engaged in protected speech. First, in *Langford,* this court acknowledged that, aside from the temporal proximity between Lane's requests to speak with Langford about their problems and Langford's scheduled speaking engagement with the Board of Commissioners, plaintiff had brought forth no evidence showing that Lane was trying to intimidate her into not speaking in front of the Board, nor was there any additional evidence aside from the temporal proximity of the termination and

her speech which indicated that the defendants had retaliated against her for speaking. *Id.* at 682. In the current case, Cockrel's testimony regarding the warning she received from Mooneyhan, as well as the materials attached to the summative evaluation, are pieces of evidence that cast more doubt on the defendants' motives in terminating Cockrel than existed in *Langford.*

In addition, in *Langford,* plaintiff's supervisor appeared ready and willing to terminate plaintiff as soon as plaintiff refused to speak with her about the problems the two were having. Langford was then swiftly terminated after she failed to attend a meeting with Lane in which they were to discuss their dispute. In the current case, there is less evidence that the defendants were sufficiently motivated by Cockrel's conduct apart from her decision to speak when they made their decision to terminate her. In this case, although Mooneyhan cited seventeen charges constituting the basis for Cockrel's termination, several of the proffered reasons provide a less than compelling basis for termination. For example, Mooneyhan cited Cockrel's frequent use of the school's telephone for non-school-related business, her failure to prepare adequate lesson plans for substitute teachers, and her failure to follow the school's visitors policy for the first Harrelson visit. For each of these charges, there is no evidence in the record that Cockrel had ever been disciplined or reprimanded in any way for these violations prior to their inclusion as bases for her termination. Furthermore, while many of the more serious allegations detailed in the termination letter (*i.e.,* calling Principal Slate names and inappropriate displays of anger in class) occurred well before Harrelson came to Simpsonville to

speak on industrial hemp, there is no evidence that this misconduct was ever acted upon by any school administrator until after Harrelson made his initial visit. Based on this evidence, we do not believe that the defendants have met their burden at the summary judgment stage of showing that their decision to discharge Cockrel would have been made regardless of her decision to engage in constitutionally protected speech.

We are well aware that Cockrel's decision to speak cannot immunize her from an adverse employment decision arising out of inappropriate workplace behavior unrelated to her protected speech. Similarly, an employer is not immunized from its decision to terminate an employee based on her speech simply because that employee has engaged in other conduct that could have constituted legitimate grounds for discharge. Rather, on review of a defendant's motion for summary judgment, if the plaintiff has made out the elements of her First Amendment retaliation claim, we must be confident that the defendant's decision to terminate the plaintiff was not based in part upon the plaintiff's decision to speak. In this case, the defendants have not met this burden, and we believe that a genuine issue of material facts exists from which a reasonable jury could conclude that Cockrel would not have been terminated had she not engaged in constitutionally protected activity. Thus, this matter should be resolved at trial rather than at the summary judgment stage.

III. SUMMARY

For the foregoing reasons, we **REVERSE** the district court's decision granting defendants' motion for summary judgment, and **REMAND** to that court for further proceedings.

CONCURRENCE

SILER, Circuit Judge, concurring. On the face of it, it appears inappropriate for a fifth grade class to have a celebrity speaker on a matter as complicated as legalizing industrial hemp. It is a matter of public concern in Kentucky, as evidenced by anecdotal illustrations in the majority opinion; nevertheless, matters of public concern may be outweighed by the school's interest in maintaining certain legitimate goals or missions. *See Williams v. Kentucky*, 24 F.3d 1526, 1536 (6th Cir.), *cert. denied*, 513 U.S. 947 (1994).

Here, the school might very well have precluded the teacher from allowing Harrelson and others to discuss legalization of industrial hemp before a class of children in a grade school, even where it might be a valid topic in high school or college. One could point out a myriad of subjects appropriate for an older audience that would not promote a valid educational purpose for grade school children. However, the school approved in advance the subject matter and the speaker. It now must pay the

penalty for giving prior approval, because it cannot now be heard that such conduct by Cockrel was disruptive.

Likewise, Cockrel's conduct, if true, toward the principal and other teachers may very well have supported a dismissal for cause, but the school took no action toward her for some of this conduct until after the community became agitated following Harrelson's visit. Thus, as the majority opinion relates, the burden is upon the school board to show that the dismissal would have occurred even in the absence of the protected conduct. *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). The district court correctly found that the school board presented evidence to show that Cockrel would have been fired regardless of her protected conduct. Nevertheless, Cockrel has also presented evidence to the contrary, which makes this a factual issue that cannot be decided by summary judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 98-40

DONNA COCKREL,

PLAINTIFF,

V.

SHELBY COUNTY SCHOOL DISTRICT, ET AL.,

DEFENDANT.

MEMORANDUM OPINION AND ORDER

(Filed Jan. 28, 2000)

* * *

This matter is before the Court on Defendants' motion for abstention, or in the alternative for summary judgment [Record No. 28]. Plaintiff has failed to respond. This matter is now ripe for decision. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff is a former elementary school teacher with the Shelby County school system. She alleges that upon exercising her constitutional right to free speech, the defendants retaliated against her by unlawfully terminating her employment in violation of 42 U.S.C. § 1983 and in breach of her contract. Plaintiff's complaint seeks compensatory and punitive damages as well as an injunction requiring the defendants to expunge records and take other corrective action to remove all adverse references

regarding Plaintiff's discharge and suspension from same.

On May 30, 1996, Plaintiff presented to her fifth grade class a segment on industrial hemp. Included in said presentation was a visit by actor Woody Harrelson and several industrial hemp farmers. This event drew attention from numerous local and national news organizations, some of which repeatedly broadcasted coverage of the presentation and the controversy surrounding same. Plaintiff alleges that the defendants retaliated against her by using this presentation and its controversy to fabricate grounds for her termination.[1]

To the contrary, the defendants state that Plaintiff was terminated on the grounds of insubordination, conduct unbecoming a teacher, inefficiency, incompetency, and neglect of duty. Defendants' statement of the case in its memorandum supporting the motion at bar, specifically points to seventeen instances upon which her termination was based.

As a tenured teacher, Plaintiff was entitled to request a hearing on her termination grounds. Plaintiff requested said hearing, but withdrew this request prior to its scheduled date. As a result of the withdrawal, her termination became final as of July 15, 1997.

Prior to the scheduled hearing and consistent with the then-operative provisions of K.R.S. 156.101, Plaintiff

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[1] Harrelson visited Plaintiff's classroom twice; once on May 30, 1996, and again on January 29, 1997. It is the May 30, 1996 presentation which Plaintiff claims was the basis for her termination.

received a summative evaluation report prepared by Principal Bruce Slate. Said report indicated that Plaintiff did not meet the school district's standards in several areas. A local evaluations appeals panel affirmed same. It was in part on this report and the affirmance by the local evaluations appeals panel that Superintendent Leon Mooneyhan terminated Plaintiff's employment.

On October 22, 1997, Plaintiff challenged Principal Slate's summative evaluation report to the state evaluation appeals panel. Said panel denied this appeal as untimely, as regulations require an appeal of the local evaluation appeals panel to be filed within thirty days of a decision by same.[2]

Plaintiff filed a complaint in Shelby County Circuit Court on April 13, 1998 against the Shelby County Board of Education and Superintendent Mooneyhan. This state court complaint alleged a failure by same to comply with due process during Plaintiff's appeal and evaluation process. Among Plaintiff's requested relief in said complaint, was that her performance evaluation for the 1996-97 school year be declared null and void and removed from her personnel file. She further requested that any decision relying upon said evaluation also be declared void. Plaintiff chose to pursue her First Amendment claims in a federal forum, and filed this instant action on June 4, 1998.

Kentucky law required Superintendent Mooneyhan to report Plaintiff's charges in support of termination to

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[2] The local evaluation appeals panel rendered its decision on April 29, 1997.

the Kentucky Education Professional Standards Board so that it may take any necessary action regarding Plaintiff's teaching certificate. On March 11, 1999 Plaintiff surrendered her teaching certificate pursuant to an agreed order with said board, with the surrender retroactively commencing June 30, 1997 through June 30, 1999. Said agreed order also included a suspension of her certificate from July 1, 1999 to June 30, 2001.

CONCLUSIONS OF LAW

I. Motion for Abstention

It has long been held that the *Younger v. Harris,* 401 U.S. 37 (1971), abstention doctrine in which a federal court refrains from exercising its jurisdiction, is "the exception, not the rule." *Colorado River Water Cons. Dist. v. United States,* 424 U.S. 800, 813 (1976). Abstention is appropriate only when all of the following elements are satisfied: (1) there is a pending state proceeding; (2) an important state interest exits [sic]; and (3) there is an adequate opportunity to raise constitutional challenges in the state court. *See Younger,* 401 U.S. at 43-54; *see also Hayse v. Wethington,* 110 F.3d 18, 20-22 (6th Cir. 1997).

The defendants argue that Plaintiff's pending state court proceeding which involves several important and novel state law issues yet to be addressed by Kentucky's appellate courts, is sufficient grounds upon which to invoke the abstention doctrine. The Court agrees that the Shelby Circuit Court will undertake some novel issues regarding Plaintiff's due process violation claims.

Plaintiff's complaint contains basically two causes of action. The cause set forth under the First Amendment is purely federal in nature, while Plaintiff's breach of contract claim is grounded in both state and federal law. The Court agrees that the abstention doctrine should be applied to Plaintiff's breach of contract claim for reasons of comity as a "vital consideration exists" in the Shelby Circuit Court's "sovereign ability to . . . determine its own law." *Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1075 (6th Cir. 1998). However, the Court reasons that Plaintiff's state court claims are not "inextricably tied up" with her First Amendment cause pending in this Court. *Hayse*, 110 F.3d at 21. Therefore, this Court's resolution of Plaintiff's First Amendment claim will not "constitute undue federal interference in state judicial or quasi-judicial proceedings." *Carroll*, 139 F.3d at 1077.

Furthermore, while Plaintiff may have requested similar relief in both her state and federal cases, the First Amendment claim is quite distinguishable. Unlike the causes before the Shelby County Circuit Court, this Court's resolution of Plaintiff's First Amendment claim will not require the Court to delve into Kentucky law. Instead, this Court will focus only on the issue of free speech under the United States Constitution, and the application of same to the conduct of the plaintiff. Hence, an exercise of federal jurisdiction on this single claim would not "disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). Neither would a decision by this Court be deemed merely advisory, thus rendering "the litigation underlying it meaningless." *Id.*

Therefore, the Court grants in part and denies in part Defendants' motion for abstention in accordance with the reasoning set forth above. With this issue resolved, it is proper for the Court to review the merits of Defendants' arguments for summary judgment.

II. Motion for summary judgment

A. Applicable Standard

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party may discharge its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party "cannot rest on [its] pleadings," and must show the Court that "there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997).

B. Immunity issues

The defendants have asserted grounds upon which they are entitled to immunity from Plaintiff's claims. This Court, has held that Kentucky defendants in this type of action are not entitled to Eleventh Amendment immunity. *See Blackburn v. Floyd County Bd. of Educ.*, 749 F.Supp. 159, 163 (E.D. Ky. 1990). Sister courts have reached similar conclusions. *See e.g. Doe v. Knox County Bd. of Educ.*, 918 F.Supp. 181 (E.D. Ky. 1996); *Tolliver v. Harlan County Bd. of*

Educ., 887 F.Supp. 144 (E.D. Ky. 1995). In light of *Blackburn*, Defendants' arguments for Eleventh Amendment immunity deserve no extended treatment. There is also the issue of whether Defendants Mooneyhan and Slate in their individual capacities are entitled to qualified immunity. The Court need not address this issue for the reasons set forth below.

C. Plaintiff's First Amendment Claim

In order to establish a prima facie case for a violation of her constitutional right to free speech, Plaintiff must show that (1) her "conduct was constitutionally protected," and (2) that said conduct was the "substantial", i.e. "motivating factor" in the defendants' decision to terminate her employment. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Should Plaintiff successfully establish the aforementioned elements, the burden shifts to the defendants to demonstrate by a preponderance of the evidence that it would have terminated Plaintiff despite the exercise of her constitutionally protected speech. *See id.*

The circumstances at bar require the Court to determine if the selection of industrial hemp as part of her fifth grade curriculum constitutes an exercise of Plaintiff's First Amendment rights. In determining whether same is First Amendment speech, and therefore constitutionally protected, the Court must take into consideration the "nature of [Plaintiff's] activity, combined with the factual context and environment in which it was undertaken. . . . " *Spence v. Washington*, 418 U.S. 405, 409-10 (1974).

Plaintiff's complaint does not allege that she vocally expressed her opinions and ideas on the use of industrial hemp. Her free speech claim is based solely on conduct. The Supreme Court in *U.S. v. O'Brien*, 391 U.S. 367 (1968) held that not every form of conduct is considered speech. Rather, "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376. The Sixth Circuit and neighboring sister circuits have provided this Court with a comprehensive analytic framework in which to evaluate what can be termed "academic expression" by a teacher.

Fowler v. Bd. of Educ. of Lincoln County, Ky., 819 F.2d 657 (6th Cir. 1987), involved a school board's termination of employment with a high school teacher after she showed the "R" rated movie, *Pink Floyd – The Wall*, to her students on the last day of school. Fowler was a tenured teacher who had been with the Lincoln County School System for fourteen years. She argued that her decision to show this movie to her classes was constitutionally protected by the First Amendment, and that her termination was in violation of her rights.

The *Fowler* Court noted that while neither " 'students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' " *Id.* at 661 (quoting *Tinker v. Des Moines Indep. Community Sch. District*, 393 U.S. 503, 506 (1969), Fowler's "conduct in having shown the movie cannot be considered expressive or communicative, under the circumstances presented. . . . " *Fowler*, 819 F.2d at 664. Thus, Fowler's conduct was not constitutionally protected as her actions failed to fall under the rubric of First Amendment free speech.

The Fifth Circuit's view on academic freedom is manifested in *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), in which a high school teacher's probationary employment contract was not renewed as an alleged consequence of, among other actions, his use of a "nonapproved reading list in his world history class. . . . " *Id.* at 795. The *Kirkland* decision was based on the conclusion that the teacher's selection of a "world history reading list does not present a matter of public concern", and that the facts presented "nothing more than an ordinary employment dispute." *Id.* at 802.

Said conclusion was grounded in the fact that when the nature of one's speech is purely private, an employee has no First Amendment protection of said speech. *See Connick v. Myers*, 461 U.S. 138, 146 (1983). According to the appellate court, Kirkland's reading list did not rise to a level of public concern, which is required to attain the status of First Amendment speech. *See id.* at 799. The *Kirkland* Court concluded that it takes more than the "speaker's interest in the subject matter" to create public concern. *Id.* at 798. Instead, the speech communicated by a teacher must be conveyed "in his *role as a citizen* and not in his *role as an employee* of the school district." *Id.* at 799 (emphasis in original). Said reasoning tracks the Supreme Court's discussion in *Connick* that the topic of an employee's speech does not become a matter of public concern just "because its subject matter could, in different circumstances, have been the topic of communication to the public that might be of general interest." *Connick*, 461 U.S. at 148 n.8.

Recently, the Fourth Circuit declined to extend First Amendment protection to a high school teacher's selection of the play, *Independence,* to be produced by her advanced drama class. *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 47 (1998). It was Boring's contention that she was punished by being transferred to another school for her selection and production of the aforementioned play, and that such a transfer violated her First Amendment rights. *See id.* at 369. The *Boring* Court held otherwise, stating that as a teacher, she had "no First Amendment right to insist on the makeup of the curriculum . . . [and] that the school administration [had] a legitimate pedagogical interest" in the performances by the advanced drama class. *Id.* at 370.

The appellate court concluded that the battle over *Independence* was "nothing more than an ordinary employment dispute," and that it did "not constitute protected speech and has no First Amendment protection." *Id.* at 369. The *Boring* Court relied on the reasoning in *Kirkland,* and determined the drama teacher's case to be indistinguishable from that of the history teacher's in the Fifth Circuit case. *See id.*

A review of the facts of Plaintiff's case leads the Court to conclude that Plaintiff's selection of industrial hemp and the presentation of same as part of her curriculum is much like the actions of the plaintiffs in *Fowler, Kirkland,* and *Boring.* She does not allege that she either supports or abhors the notion of industrial hemp. Plaintiff merely claims that she presented her class with some information on same. This type of conduct does not constitute free speech as set forth by the Supreme Court.

Plaintiff's conduct was not conveyed in a manner to send a "particularized message" as set forth in *Spence*.[3] *Spence*, 405 U.S. at 411. Nor was the likelihood great that any intended message would be understood by the ten and eleven year olds that viewed it. *See id.*

Plaintiff's presentation on industrial he[illegible] is not a form of speech that is protected by the First Amendment. Her conduct cannot be considered expressive or communicative under the circumstances alleged in her complaint, and her First Amendment rights are not even implicated. Therefore, this judicial inquiry comes to an end, and the question of whether Plaintiff's speech was a substantial motivating factor in her termination need not even be addressed by this Court.

The holdings by the Court do not reflect its opinion of the propriety of Plaintiff's actions. The Court notes that the issue of industrial hemp is politically charged and of great concern to certain citizens. Rather, federal law requires the Court to focus on Plaintiff's conduct and whether it deserves being classified as an expression protected by the First Amendment. For the reasons set forth in this Memorandum Opinion and Order, Plaintiff's conduct is not free speech. The fact that at some point during or after the presentation Plaintiff may have developed an approval or disapproval of the use of industrial

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[3] *Spence* involved the criminal prosecution of an individual who displayed an American flag with a peace symbol attached to same in protest against the invasion of Cambodia and the Kent State University shootings, both which occurred several days prior to his arrest. *Spence*, 418 U.S. at 408. It was Spence's intent to demonstrate that America stood for peace. *See id.*

hemp, does not, standing alone, provide a sufficient basis for the conclusion that her conduct was a "form of expression entitled to protection under the First Amendment." *Fowler*, 819 F.2d at 663. Plaintiff is unable to establish a prima facie case, and there is no genuine issue of fact to preclude a grant of summary judgment to the defendants.

III. Conclusion

As previously stated in this Memorandum Opinion and Order, the Court abstains from rendering a decision on Plaintiff's breach of contract claim based on *Younger v. Harris*, 401 U.S. 37 (1941). Plaintiff's remaining First Amendment claim must fail as her selection of industrial hemp as part of her classroom curriculum is not a form of protected speech. All causes being resolved, this action is hereby dismissed.

Accordingly,

IT IS ORDERED:

(1) That Defendants' motion for abstention be, and the same hereby is, **GRANTED IN PART AND DENIED IN PART** in accordance with this Memorandum Opinion and Order;

(2) That Defendants' motion in the alternative for summary judgment be, and the same hereby is, **GRANTED**.

This is the 28th day of January, 2000.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 98-40

DONNA COCKREL, PLAINTIFF,

V. ORDER

(Filed Feb. 15, 2000)

SHELBY COUNTY SCHOOL DIST., ET AL., DEFENDANTS.

* * *

Plaintiff has moved this Court to reconsider the Memorandum Opinion and Order issued by the Undersigned on January 28, 2000 [Record No. 33]. Defendant has responded to same [Record No. 36]. Plaintiff has also filed a motion to extend the time in which to respond to Defendants' motion for summary judgment, the matter before the Court in its January 28, 2000 ruling [Record No. 35]. As of the date of entry of this Order, no response has been filed.

Prior to the issuance of the January 28, 2000 ruling, the Court thoroughly reviewed all issues present in Defendants' motion for summary judgment, and concluded that federal law requires a dismissal of this action. It remains clear to this Court that Plaintiff's selection of industrial hemp as part of her classroom curriculum is not a form of speech entitled to protection by the First Amendment. Furthermore, federal law requires this Court to abstain from rendering a decision on the remaining breach of contract claim. For these reasons Plaintiff has no merited argument as to why the defendants

should not have been granted summary judgment in the above-styled action.

The Court declines to grant either of Plaintiff's motions as it correctly concluded that no genuine issue of material fact exists in this action. Permitting Plaintiff to file a belated response would be an exercise in futility.

Accordingly,

IT IS ORDERED:

(1) That Plaintiff's motion to reconsider be, and the same hereby is **DENIED**;

(2) That Plaintiff's motion for an extension of time be, and the same hereby is, **DENIED**.

This is the 14th day of February, 2000.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

00-5259

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNA COCKREL, Plaintiff-Appellant, v. SHELBY COUNTY SCHOOL DISTRICT, ET AL., Defendants-Appellees.	)	ORDER (Filed Jan. 16, 2002)

BEFORE: SILER, MOORE, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

KRS 161.790 (Michie 1996)

(1) The contract of a teacher shall remain in force during good behavior and efficient and competent service by the teacher and shall not be terminated except for any of the following causes:

(a) Insubordination, including but not limited to violation of the school laws of the state or administrative regulations adopted by the Kentucky Board of Education or lawful rules and regulations established by the local board of education for the operation of schools, or refusal to recognize or obey the authority of the superintendent, principal, or any other supervisory personnel of the board in the performance of their duties;

(b) Immoral character or conduct unbecoming a teacher;

(c) Physical or mental disability;

(d) Inefficiency, incompetency, or neglect of duty, when a written statement identifying the problems or difficulties has been furnished the teacher or teachers involved.

(2) Charges under subsections (1)(a) and (1)(d) of this section shall be supported by a written record of teacher performance by the superintendent, principal, or other supervisory personnel of the district, except when the charges are brought as a result of a recommendation made by a Kentucky distinguished educator under KRS 158.6455.

(3) No contract shall be terminated except upon notification of the board by the superintendent. Prior to notification of the board, the superintendent shall furnish

the teacher with a written statement specifying in detail the charge against the teacher. The teacher may within ten (10) days after receiving the charge notify the chief state school officer and the superintendent of his intention to answer the charge, and upon failure of the teacher to give notice within ten (10) days, the dismissal shall be final.

(4) Upon receiving the teacher's notice of his intention to answer the charge, the chief state school officer shall appoint a three (3) member tribunal, consisting of one (1) teacher, one (1) administrator, and one (1) lay person, none of whom reside in the district, to conduct an administrative hearing in accordance with KRS Chapter 13B within the district. The chief state school officer shall name the chairman and set the date and time for the hearing. The hearing shall begin no later than forty-five (45) days after the teacher files the notice of intent to answer the charge.

(5) The hearing may be public or private at the discretion of the teacher. At the hearing, a hearing officer appointed by the chief state school officer shall preside with authority to rule on procedural matters, but the tribunal shall be the ultimate trier of fact. The local board shall pay each member of the tribunal a per diem of one hundred dollars ($100) and travel expenses.

(6) Upon hearing both sides of the case, the tribunal may by a majority vote render its decision or may defer its action for not more than five (5) days. Provisions of KRS Chapter 13B notwithstanding, the tribunal decision shall be a final order and may be rendered on the record.

(7) The superintendent may suspend the teacher pending final action to terminate the contract, if, in his judgment, the character of the charge warrants the action. If after the hearing the decision of the tribunal is against termination of the contract, the suspended teacher shall be paid his full salary for any period of suspension.

(8) The teacher shall have the right to make an appeal to the Circuit Court having jurisdiction in the county where the school district is located in accordance with KRS Chapter 13B.

(9) As an alternative to termination of a teacher's contract, the superintendent upon notifying the board and providing written notification to the teacher of the charge may impose other sanctions, including, suspension without pay, public reprimand, or private reprimand. The procedures set out in subsection (3) of this section shall apply, except to a private reprimand. The teacher may appeal the action of the superintendent, except a private reprimand, in the same manner as established in subsections (4) to (8) of this section. Upon completion of a suspension period, the teacher may be reinstated.

KRS 161.120 (Michie 1996)

(1)(a) Any certificate issued under KRS 161.010 to 161.100, or any certificate or license issued under any previous law to superintendents, principals, teachers, supervisors, directors of pupil personnel, or other administrative, supervisory, or instructional employees may be

revoked by the Education Professional Standards Board for immorality, misconduct in office, incompetency, violation of the school laws of the state or administrative regulations adopted by the Kentucky Board of Education, willful neglect of duty, conviction of a misdemeanor offense under KRS Chapter 510 involving a student, or a felony offense under KRS Chapter 510, 530.064, or 531.310, or being found by the Education Professional Standards Board to have had sexual contact as defined in KRS 510.010(7) with a student, or upon the determination that a certificate applicant presented or declared false information toward obtaining the issuance or renewal of any type of teacher certification.

(b) The board may revoke an individual's certificate if the certificate was revoked or voluntarily surrendered in another state on the same or similar grounds provided in this subsection.

(2)(a) The superintendent of each local school district shall report in writing to the Education Professional Standards Board the name, Social Security number, position name, and position code of any certified school employee in his district whose contract is terminated or not renewed, for cause; who resigns from, or otherwise leaves, a position under threat of contract termination, or nonrenewal, for cause; who is convicted in a criminal prosecution; or who is otherwise known to have engaged in any actions or conduct as might reasonably be expected to warrant consideration for certificate revocation. The duty to report shall exist without regard to any disciplinary action, or lack thereof, by the superintendent, and the required report shall be submitted within

thirty (30) days of the event giving rise to the duty to report.

(b) The district superintendent shall inform the Education Professional Standards Board in writing of the full facts and circumstances leading to the contract termination or nonrenewal, resignation, or other absence, conviction, or otherwise reported actions or conduct of the certified employee, which are based on immorality, misconduct in office, incompetency, violation of school law or administrative regulation promulgated by the Kentucky Board of Education, willful neglect of duty, or falsification of certification credentials, and shall forward copies of all relevant documents and records in his possession.

(c) The Education Professional Standards Board may consider reports and information received from other sources. The certified school employee shall be given a copy of any report provided to the Education Professional Standards Board by the district superintendent or other sources and shall have the right to file a written rebuttal which shall be attached to the district superintendent's report.

(3)(a) Upon taking action to initiate proceedings to revoke a certificate, the Education Professional Standards Board shall schedule and conduct a hearing in accordance with KRS Chapter 13B.

(b) The hearing may be public or private at the discretion of the certified employee.

(c) The hearing shall be conducted by the full board or a person appointed as hearing officer by the board.

(4) If the Education Professional Standards Board substantiates that sexual contact occurred between a certified employee and a student, the employee's certificate may be revoked or suspended with mandatory treatment of the employee as prescribed by the Education Professional Standards Board. The Education Professional Standards Board may require the employee to pay a specified amount for mental health services for the student which are needed as a result of the sexual contact.

(5) Any individual whose certificate is revoked may apply for reissuance of his certificate when he believes he can demonstrate himself suitable for reissuance, unless the Education Professional Standards Board's order of revocation sets forth a specific minimum period of revocation.

(6) An appeal from any final order of the Education Professional Standards Board shall be filed in Franklin Circuit Court in accordance with KRS Chapter 13B.

KRS 161.020(1)

(1) No person shall be eligible to hold the position of superintendent, principal, teacher, supervisor, director of pupil personnel, or other public school position for which certificates may be issued, or receive salary for services rendered in such position, unless he holds a certificate of legal qualifications for such position.

KRS 218A.010(14)

(14) "Marijuana" means all parts of the plant Cannabis sp., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin or any compound, mixture, or preparation which contains any quantity of these substances.

* * *

KRS 218A.1422

(1) A person is guilty of possession of marijuana when he knowingly and unlawfully possesses marijuana.

(2) Possession of marijuana is a Class A misdemeanor.

[LOGO] **Shelby County Public Schools**

P.O. Box 159 • 403 Washington Street
• Shelbyville, KY 40066-0159 • (502) 633-2375 •
Fax: (502) 633-1988
Leon Mooneyhan, Ph.D., Superintendent

July 15, 1997

Ms. Donna Cockrel
PO Box 191
Simpsonville KY 40067

RE: Suspension and Termination of Contract as Teacher

Dear Ms. Cockrel:

You are advised, pursuant to KRS 160.370(1), KRS 160.390, and KRS 161.790, effective on your receipt of this letter, that as Superintendent of the Shelby County School District I have terminated your contract as a teacher with this school district. A copy of my action is attached hereto and made a part hereof by reference marked "Exhibit 1."

Also, pursuant to KRS 161.790(7), I have suspended you from your employment in this school system pending any appeal of my action to terminate your contract as a teacher. A copy of this suspension by me as Superintendent is attached hereto and made a part hereof by reference marked "Exhibit 2."

The general charges for the suspension and termination of your contract are insubordination (including, but not limited to, violation of state and federal laws and local Board policies and procedures and refusal to recognize or obey the authority of the Superintendent, Principal or

other supervisory personnel of the Board in the performance of their duties), conduct unbecoming a teacher and inefficiency, incompetency and neglect of duty. The specific charges constituting the basis for your suspension and termination are set out below:

1. In the 1996-97 school year you failed to teach the "Just Think" curriculum for your first formative observation as requested by the Principal, and failed to teach that curriculum in general as set out in your summative evaluation dated March 26, 1997 in violation of KRS 161.170 and Board Policy 08.11. This also demonstrates your refusal to recognize and obey the authority of the Principal. This is insubordination and neglect of duty.

2. You called the Principal names (e.g. "bastard," [a male student heard you use this term during the 1995-96 school year], "son of a bitch" [Gail Russell heard you use this term in May 1995], "pecker head" [Sarah Minnis and Donna Sutton heard you refer to Mr. Slate by this term], and "white mother fucker" [Phyllis Smith heard you call Mr. Slate this during the fall semester of 1995]) in front of other staff members and students in violation of Board Policy 03.162. This is insubordination, conduct unbecoming a teacher and breaches the Code of Ethics for Certified Personnel because you failed to accord just and equitable treatment to all members of the profession in the exercise of their professional rights and responsibilities.

3. You slapped the Principal's desk and called him a liar in August 1996; in the fall semester of 1996 you told Sarah Minnis that the Principal spied on you from the FRYSC office and in the spring semester of 1995 you told Bonnie Mullins, a parent of a student that the Principal was out to get you and on May

30, 1996 you told Jewell Ware he never liked you and that you had him over a barrel. This conduct is unbecoming a teacher.

4. In the 1995-96 and 1996-97 school years you failed to cooperate with the Title I program in violation of Title I and Board Policy 03.133, even after agreeing to do so in a meeting with the Principal and Title I teacher. (e.g. You requested Title I aides to perform tasks not within the program, [among other things, coping pages from books and running personal errands for you]; you deprived students of Title I services by, among other things, not permitting the aides to work with them and by failing to send the students for services [see your copy of SC 113].) This is insubordination and neglect of duty.

5. In the 1995-96 and 1996-97 school years you failed to show respect to Title I aides and teacher after the Principal directed you to do so (among other things, you often ignored Lida Craft and all three of your in-room Title I aides throughout both school years), and you failed to cooperate with professional associates and staff (e.g. you were uncooperative in the 1995-96 school year regarding the mathematics team teaching and you were disrespectful, rude, unfriendly and sarcastic to staff and Title I aides) in violation of Board Policy 03.133. (See examples attached to your summative evaluation.) This is insubordination and breaches the Code of Ethics for Certified personnel because you failed to accord just and equitable treatment to all members of the profession in the exercise of their professional rights and responsibilities.

6. In late March or early April 1997 you violated 20 U.S.C. Section 1232g, the Family Educational Rights and Privacy Act (FERPA) and KRS 160.700 et seq. (e.g. you provided the media access to letters from

students' parents along with your SC100 form.) This is insubordination and neglect of duty.

7. On May 30, 1996 you failed to keep a student out of the range of media cameras knowing that the student's parents had indicated on media release form that they did not want the child's likeness to appear in the media. This is insubordination and neglect of duty.

8. In the fall semester and early spring semester of the 1996-97 school year you failed to cooperate with parents in violation of Board Policy 03.133. (e.g. you failed to communicate expectations, criteria for assessment, student progress, and students' strengths and weaknesses to parents in a timely manner. [see letters from parents attached to your SC100 form.]) This is insubordination, conduct unbecoming a teacher and neglect of duty.

9. You were dishonest and/or deceptive. (e.g. on May 30, 1996 and early June 1996 you lied to the principal or on August 9, 1996 to Linda Armstrong, the Board Attorney or both regarding when you learned that Woody Harrelson would be visiting your classroom in May 1996; you lied to the Principal when you told him the morning of Woody Harrelson's expected visit, January 22, 1997, that you did not know if Mr. Harrelson was coming that day, when you knew at least the night before that he would not be there; in late April, 1997 you lied, through your attorney, to Assistant Superintendent, Tina Tipton, about whether you provided the media access to letters from students' parents along with your SC100 form; in April 1996 you requested your Title I aide, Donna Sutton, to complete Pizza Hut reading program coupons when no records indicated any student had read the required number of books; in the Spring semester of 1994, among other

years, you encouraged and/or knowingly permitted your students to cheat at Field Day events; and you retaught a previous lesson in an attempt to fool Lida Craft and Mary Wagoner during their observation of you on February 13, 1997. This is conduct unbecoming a teacher.

10. You cursed in front of students and verbally and physically vented anger in other inappropriate means in front of students. (e.g. among other things, in October and November, 1995 you shoved chairs, causing them to fall, in December 1995 you shoved books off tables onto the floor; you slammed books forcefully on tables or desks and you kicked a trash can; on October 5, 1995 and November 14, 1995 you wadded or tore up a student's homework and threw it in the trash can; and you threw items across the room.) This is conduct unbecoming a teacher.

11. You breached the Code of Ethics for Certified Personnel, among other ways, by failing to protect the emotional well being of students and subjecting students to embarrassment and disparagement. (e.g. you stated in front of the class, including the male student, in the Spring of 1995, that the student's parents were thieves and liars and that the student did not deserve to go to Washington D.C. with the rest of the class; you disparaged the student's clothing in front of the student and the rest of the class and other personnel; in May, 1997 you singled out three female students complaining that they "fibbed" to the Principal and/or their parents about your supervision of them on a field trip; in February, 1996 you ridiculed a female student who had left early several times, asking her if she was going to leave early again or stay the rest of the day the way she should; throughout the 1995-96 and

1996-97 school years you yelled at your students and called them derogatory names and referred to them in demeaning terms [by, among other things, referring to the class as "lazy" (in October 1995 and December 1995), "slow and boring" (in December 1995) and stating, "I'm not going to stress myself out over these kids, they are not worth it" (October 25, 1995).]) This is conduct unbecoming a teacher.

12. You further breached the Code of Ethics for Certified Personnel because you failed to endeavor to understand the diverse home environments of students and failed to demonstrate sensitivity to students' academic, social and cultural differences. (e.g. See comments regarding male student, above; in December 1995 you asked a female student to bring refreshments to school knowing a fire had destroyed her home; during the 1996-97 school year you singled out two male students for ridicule and/or criticism because their parents disagreed with your beliefs.) This is conduct unbecoming a teacher.

13. You further breached the Code of Ethics for Certified Personnel because you have not exemplified behavior which maintains the dignity and integrity of the profession. (e.g. on February 13, 1997 you "high fived" a male student after you retaught a lesson in an attempt to fool the observers and stated, "we fixed them;" in the spring semester of 1996 and the entire 1996-97 school year you aired your private grievances with the Principal, Superintendent and Board and with debt collectors in front of your students; you cursed in front of your class; in November 1996 you referred to the school-adopted "Just Think" curriculum as "Just Stink" and stated that it is trash; in late January and early February 1997 you decorated your attendance

record with "smiley faces" for students reassigned to other classrooms; in February 1997 during instruction time you used the intercom to ask the school secretary if the Principal said you were to be docked three days and called the office to say, "Call Dr. Mooneyhan, I need to know immediately;" on January 13, 1997 you sent students to the office to tell the Principal you want a letter sent home and a televised conference; you frequently sent students out of class to run errands for you and to deliver messages [among other things, on November 22, 1996, you sent a male student to find out if other staff members received flowers and on November 25, 1996, you sent two male students to other classrooms to do a survey of how many times Mr. Slate visits those rooms].) This is conduct unbecoming a teacher.

14. You failed to cooperate with and/or work collaboratively with professional associates and staff. (e.g. in the 1995-96 and 1996-97 school years you failed to participate in team meetings; when called upon for attendance, you responded, "I'm into something. I'll send it later;" you asked and expected other staff members to run your personal errands [numerous times, but, for example, on September 18, 1996, you asked Sarah Minnis to go to the bank for you, on October 11, 1996, you asked her to take a letter by the Sentinel News office for you, and on November 4, 1996, you sent a female student to tell Mrs. Minnis to get lunch for you]; you failed to cooperate with the Title I program; you jerked a telephone from Janice Medley; you told Jesse Poe and Gail Crawford not to waste their breath after they said "good morning" to you; you told Jesse Poe, "Don't open your mouth.") This is conduct unbecoming a teacher.

15. You failed to require all visitors to your classroom to check in with the Principal on May 30, 1996, in violation of Board Policy 10.5, even after the Principal reminded you of the policy. This is insubordination.

16. You failed to prepare adequate lesson plans for use by substitute teachers and other personnel (for example, on October 28, 1996, Ms. Gray could not understand your lesson plan, on November 15, 1996 Mrs. Smith had to find things to occupy the class because she was confused by your lesson plan, and on January 7, 1997, Mrs. Reed was upset because she could not make out the lesson plan and had to ask Mr. Slate what to do with the class) in violation of Board Policy 08.212 and procedure 08.212 *A.P.I.* You also failed to prepare adequate lesson plans for yourself (e.g. on February 13, 1997, you repeated a lesson you previously taught.) This is neglect of duty.

17. You frequently used the school's telephone for non-school-related business in violation of Board Policy 03.13211, and failed to reimburse the school for long distance telephone charges, when other staff members who used the school's telephone have routinely reimbursed the school for those charges.

You are entitled by law within ten (10) days after receipt of these charges to notify me as Superintendent of the Shelby County School District and Dr. Wilmer S. Cody, Chief State School Officer, Capital Plaza Tower, 500 Mero Street, Frankfort, Kentucky 40601, of your intention to answer the charges. If you fail to do so, the action taken by me as Superintendent terminating your contact as a teacher with the Shelby County School District will become final. If you do answer the charges within the ten

(10) day period, a three member tribunal will be appointed by the Chief State School Officer which will conduct an impartial hearing within this school district and render a decision. For your information, a copy of KRS 161.790 and the implementing State Board of Education regulation, which set out your due process rights with respect to the suspension and termination of your teacher contract, are attached hereto and made a part hereof by reference marked "Exhibit 3."

Sincerely,

/s/ Leon Mooneyhan
Dr. Leon Mooneyhan
Superintendent

Attachments

(2)

No. 01-1548

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

SHELBY COUNTY SCHOOL DISTRICT;
LEON MOONEYHAN, Officially and Individually;
BRUCE SLATE, Officially and Individually,

Petitioners,

v.

DONNA COCKREL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Donna Cockrel (Cockrel) was a tenured fifth grade teacher at Simpsonville Elementary School in the Shelby County School District in Kentucky. For several years prior to 1996, with the knowledge and approval of her superiors, Cockrel regularly taught, and invited outside speakers to address her class on the history, characteristics, environmental benefits, production, and commercial uses of nontraditional "alternative" agricultural cash crops such as zenaf, flax, soybeans and industrial hemp. Her superiors also knew that her outside speakers included advocates for growing industrial hemp in Kentucky. Prior to 1996, Cockrel received excellent teaching evaluations and commendations from Simpsonville Elementary School Principal Bruce Slate (Slate) for her innovative teaching methods. [Record (R.) 1, Joint Appendix (J.A.) pp. 8-10; R. 20, J.A. pp. 145-147, Exhibits (Exhs.) 2, 3, J.A. pp. 216, 241; R. 22, J.A. pp. 90-91; Petition For Writ Of Certiorari (Pet.), Appendix (App.) 1, pp. 2, 4].

For her end of the school year project on the last day of class in academic year 1995-96, Cockrel chose the topic of "Saving the Trees." Her planned lesson for that day was to teach about using industrial hemp fibers rather than wood pulp to make paper and cloth. Thereafter, on April 9, 1996, Cockrel was contacted by a representative of the Cable News Network (CNN) about CNN coming to Kentucky and possibly visiting her classroom in connection with a planned television program on "Saving the Trees." Cockrel immediately notified Slate about CNN's possible visit to her classroom on the proposed program, and he approved the visit. [R. 1, J.A. p. 11; R. 22, J.A. pp. 92-93; R. 20, J.A. p. 148; App. 1, p. 4].

In early May 1996, the president of the Kentucky Hemp Growers Association (KHGA) informed Cockrel that movie actor Woody Harrelson (Harrelson) would be visiting Kentucky and he also might be able to visit her classroom with CNN on the last day of school. About 9:00 a.m. on May 30, 1996 (the last school day), the KHGA president told Cockrel by telephone that CNN and Harrelson would in fact visit her classroom that day at about 10:15 a.m. Cockrel immediately informed Slate of CNN and Harrelson's impending visit. Slate approved the visit. [R. 1, J.A. pp. 11-12; R. 22, J.A. pp. 94-97; R. 20, J.A. pp. 149-51; App. 1, p. 4].

At the appointed time, several vans arrived at Cockrel's school, carrying Harrelson, KHGA members, several hemp growers from foreign countries, CNN, and various Kentucky news media representatives. In Cockrel's classroom, Harrelson and the visitors made presentations to the class describing and advocating the use of industrial hemp in the manufacture of paper, cloth, and other commercial products. Cockrel actively participated in and endorsed the message and lesson of the presentation, which was videotaped by CNN and other national and local news media. The proceedings did not unduly disrupt the school routine. [R. 1, J.A. pp. 12-13; R. 22, J.A. p. 98; R. 20, J.A. pp. 152-53; App. 1, p. 5].

The visit by CNN and Harrelson to Cockrel's classroom and the presentations on industrial hemp were widely publicized by the news media throughout Kentucky and the United States. Immediately afterward, several parents, teachers, and school employees wrote complaint letters to Shelby County School Superintendent Leon Mooneyhan (Mooneyhan) objecting to the industrial hemp

presentation in Cockrel's classroom. [R. 1, J.A. pp. 13-14; R. 20, J.A. pp. 154-57, Exh. 4, J.A. p. 243; App. 1, p. 5].

Upon receiving the complaint letters, Mooneyhan ordered the Shelby County school board attorney to investigate Cockrel's actions relating to the visit by CNN and Harrelson. Simultaneously, Slate had the school policy relating to outside visitors regarding "controversial" matters changed to require five (5) days advance notice to and approval by the principal, a description of the visit's curricular purpose, two (2) days advance written notice to the parents of children affected, and written consent from them for their children to participate in the "controversial" classroom session. [R. 1, J.A. p. 14; R. 22, J.A. pp. 102-03; R. 21, J.A. pp. 111-19; R. 23, J.A. p. 120, Exhs. 8, 12, 13, J.A. pp. 276, 279, 283; R. 22, Exh. 6, J.A. p. 256; App. 1, pp. 6-7]. Mooneyhan subsequently threatened Cockrel that it would not be in her "best interest" for Harrelson to visit her classroom again. Likewise, Slate warned Cockrel that any discussions of industrial hemp by outside visitors to her classroom in the future would be deemed "controversial." [R. 1, J.A. p. 15; R. 20, J.A. p. 174; R. 22, J.A. pp. 104-06; App. 1, pp. 7, 8].

Based on the school board attorney's investigation, Mooneyhan formally reprimanded Cockrel on September 3, 1996, regarding the visit of CNN and Harrelson to her classroom. He also reported Cockrel to the Kentucky Educational Professional Standards Board (KEPSB) seeking – unsuccessfully – revocation of her teaching certificate for permitting hemp seeds to be shown to her class during the CNN/Harrelson visit. For his part, Slate scheduled an irregular teacher evaluation of Cockrel for academic year 1996-97, and observed her in the classroom. In his first teacher observation report, Slate gave her – for

the first time in her teaching career – an adverse rating. [R. 1, J.A. pp. 15-16; R. 20, J.A. pp. 159, 164, 165, Exh. 6, J.A. p. 256; R. 23, J.A. pp. 121-39, Exhs. 14, 15, 17, 18, J.A. pp. 285, 286, 288, 289; App. 1, pp. 6 n 1, 8].

On January 14, 1997, CNN requested and received permission from Slate to visit Cockrel's class a second time. For this visit, Slate drafted a public statement, which he read on camera. In his statement, he said that although "teaching about hemp . . . has educational value," Cockrel had experienced "problems" with petitioners, including him, about her teaching "methods." [R. 1, J.A. p. 16; R. 20, J.A. pp. 167-171, Exh. 7, J.A. p. 264; App. 1, p. 8].

Cockrel requested, and Slate also approved, a second visit by Harrelson to Cockrel's classroom on January 22, 1997, to talk about industrial hemp. For Harrelson's second visit, Cockrel duly complied with the revised policy for hosting visiting speakers on "controversial" topics. Harrelson was unable to come on January 22, however, and Cockrel duly notified Slate that Harrelson would not be visiting that day. Nevertheless, on January 22, outside protesters accompanied by local news media arrived at Slate's office, blocked the halls, and loudly voiced objections to Harrelson and Cockrel speaking about industrial hemp in her classroom. [R. 1, J.A. pp. 16-17; R. 20, J.A. pp. 175-183; App. 1, pp. 6, 7].

Harrelson rescheduled his visit for January 29, 1997, and Cockrel again fully complied with the new school policy. On his second visit, Harrelson was accompanied by local news media and representatives of the Columbia Broadcasting System. Outside demonstrators carrying signs met Harrelson on the school grounds, blocked the

schoolhouse door and hallways, and loudly objected to Cockrel and Harrelson speaking in favor of industrial hemp in her classroom. They delayed Harrelson from entering the school, disrupted Cockrel's classroom presentation, and loudly heckled them in the hallway and on the school grounds. Slate was present throughout this display and did nothing to control the demonstration. Despite this disruption, Cockrel followed her regular class schedule. [R. 1, J.A. pp. 16-17; R. 22, J.A. pp. 107-08; R. 23, Exh. 20, J.A. p. 290; R. 20, J.A. pp. 172-73, 186-94, Exh. 7, J.A. p. 264; App. 1, p. 7].

These events were reported, videotaped, and disseminated by the broadcast and print news media locally, statewide, and nationally. During February 1997, CNN telecast globally a TV segment entitled "Cannabis Controversy" about both Harrelson visits to Cockrel's classroom on its television news magazine programs. [R. 1, J.A. p. 18; App. 1, pp. 5, 7].

After Harrelson's second visit, several persons again wrote complaint letters to Mooneyhan objecting to Cockrel and Harrelson speaking on industrial hemp in her classroom. On February 12, 1997, Slate made a second teacher observation visit to Cockrel's classroom and again rated her adversely. A week later, on February 20, 1997, the Shelby County School District Parent Teachers' Association (PTA) adopted a position statement calling on Mooneyhan to discharge Cockrel for teaching her students about industrial hemp and allowing Harrelson to speak about it in her classroom. [R. 1, J.A. pp. 17-18; R. 22, J.A. p. 109; R. 20, J.A. pp. 194-01, Exhs. 8, 9, J.A. pp. 266-73, 274; R. 23, J.A. pp. 140-41, Exh. 32, J.A. p. 291; App. 1, pp. 7, 9-10].

On March 26, 1997, Slate issued his summative teacher evaluation of Cockrel, rated her adversely, and recommended she be fired. He attached to his evaluation the various complaint letters he and Mooneyhan had received. On July 15, 1997, Mooneyhan terminated Cockrel's employment in a letter containing seventeen (17) paragraphs of administrative charges against her. Four (4) of these charges related to Harrelson's visits to Cockrel's classroom on May 30, 1996, and January 29, 1997. [R. 1, J.A. p. 19; R. 23, J.A. p. 142, Exh. 34, J.A. p. 345; App. 1, pp. 10-11, 70-71, 75].

Simultaneously, Mooneyhan sent a copy of Cockrel's termination letter to the KEPSB as a basis for suspension of Cockrel's teaching certificate. Two (2) years later, on March 11, 1999, KEPSB and Cockrel entered into an agreed order in which Cockrel voluntarily surrendered her Kentucky teaching certificate retroactively for two (2) years from June 30, 1997 to June 30, 1999, and agreed to a two (2) year suspension from July 1, 1999, to July 1, 2001. [App. 1, p. 11].

On June 4, 1998, Cockrel filed an action in the United States District Court for the Eastern District of Kentucky, charging the Shelby County School District, Mooneyhan, and Slate with violating her constitutional rights under the First Amendment in violation of 42 U.S.C. §1983, and with breach of her teaching contract under state law. After limited discovery, petitioners moved for summary judgment. The District Court granted summary judgment, abstained from ruling on Cockrel's state claims, and dismissed Cockrel's constitutional claim on the grounds that her actions were not a "form of speech" protected by the First Amendment as a matter of law. [App. 1, pp. 11-

12, 45-57]. Cockrel appealed to the United States Court of Appeals for the Sixth Circuit.

On appeal, the Sixth Circuit held that Cockrel's actions constituted speech within the ambit of the First Amendment under *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U. S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) and *Schad v. Borough of Mount Ephraim*, 452 U. S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), and because she had an intent to convey a particularized message about industrial hemp to her students. Moreover, the appellate court held that Cockrel was entitled under the First Amendment to speak about industrial hemp in her classroom because the subject is a matter of public concern under *Connick v. Myers*, 461 U. S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and that her right to speak on that matter outweighed the efficiency of the public services her school provides under *Pickering v. Bd. of Educ.*, 391 U. S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Finally, the appellate court determined there was a material dispute of fact over whether a substantial or motivating factor in Cockrel's discharge was her exercise of First Amendment rights under *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The appellate court reversed and remanded the case for trial. [App. 1, pp. 2-44].

SUMMARY OF THE ARGUMENT

There is no conflict among the circuits regarding the application of *Connick v. Meyers, supra,* concerning a "matter of public concern" on the facts here. Petitioners seek only to have this Court correct alleged errors in the

appellate court decision. The decision below does not merit review by this Court to insure uniformity of law throughout the United States.

ARGUMENT

-I-

THERE IS NO CONFLICT AMONG CIRCUITS PRESENTED HERE REGARDING "MATTERS OF PUBLIC CONCERN"

The appellate court held that, under *Connick v. Myers*, *supra*, Cockrel's classroom presentations touched on "a matter of public concern." [App. 1, pp. 23-24]. The court found that her classroom speech concerning industrial hemp in Kentucky "most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest." [App. 1, p. 26]. The court rejected petitioners' contention that Cockrel's speech was not on "a matter of public concern" as a matter of law because it was curricular speech by a public school teacher in her classroom. [App. 1, pp. 25-26].

Petitioners assert here that the appellate court decision conflicts with *Kirkland v. Northside Indep. Sch. Dist.*, 890 F. 2d 794 (5th Cir. 1989), *cert. denied*, 496 U. S. 926 (1990), and *Boring v. Buncombe County Bd. of Educ.*, 136 F. 3d 364 (4th Cir.) (en banc), *cert. denied*, 525 U. S. 813 (1998). [Pet., pp. 10-14]. To the contrary, there is no conflict among circuits regarding what constitutes "a matter of public concern" under *Connick* on the facts here.

There is certainly no doctrinal conflict between this case and *Kirkland* or *Boring*. All three were decided under

Connick. All three courts determined on the entire record before them whether the particular speech involved was of public or private interest based on its content, form and context under the analysis and standards prescribed by *Connick*. *Kirkland v. Northside Indep. Sch. Dist.*, *supra*, p. 799; *Boring v. Buncombe County Bd. of Educ.*, *supra*, pp. 368-369, 372 (Luttig J., concurring); [App. 1, pp. 22-23]. These decisions do not "conflict" with each other in terms of their jurisprudence, decisional criteria or analytical methodology.

More importantly, there is no conflict in these decisions regarding their outcomes. These appellate courts properly reached different conclusions on whether the particular speech at issue was "on a matter of public concern." *Kirkland* and *Boring* are distinguishable from this case on their constitutionally relevant facts. The content, form, and context of the speech in those cases were fundamentally different from the speech in this case.

In *Kirkland*, the Fifth Circuit held that a teacher's use of a nonapproved supplemental reading list for his world history class – popular fiction – was only a matter of his private interest. *Kirkland v. Northside Indep. Sch. Dist.*, *supra*, p. 794. The court found that neither the teacher's use of the list nor alleged "book" or "ideological" censorship by the school were a matter of public concern in that community. Thus, the matter was only a private dispute under *Connick*. *Ibid.*, pp. 800-802. Similarly, in *Boring*, the Fourth Circuit held that a teacher's selection of the play "Independence" – about a dysfunctional family – for her four (4) students to perform was not a matter of public concern. *Boring v. Buncombe County Bd. of Educ.*, *supra*, p. 368. The court held that her play selection reflected only her "personal, political, and other views." *Ibid.*, p. 372

(Luttig J., concurring). The case was thus an ordinary private dispute under *Connick*. *Ibid.*

This case, on the other hand, was not a mere private dispute. The Sixth Circuit held that Cockrel's classroom "presentations" about industrial hemp "most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest." The appellate court found the subject of industrial hemp was "politically charged and of great concern" in Kentucky, a fact amply reflected in public media accounts which "only scratched the surface." [App. 1, pp. 23-26].

Moreover, the context in which speech occurred in these cases was fundamentally different. The teacher in *Kirkland* deliberately avoided the school's public administrative process for approval of such curricular materials. He pointedly claimed at trial that his control of the curriculum of his world history class was "unlimited" under the First Amendment. *Kirkland v. Northside Indep. Sch. Dist.*, *supra*, pp. 801-803. Similarly, the teacher in *Boring* "failed to follow the school system's controversial materials policy." *Boring v. Buncombe County Bd. of Educ.*, *supra*, pp. 367, 369 (quoting from *Kirkland*: [she] "disregard[ed] . . . [the school's] . . . administrative process"). She also claimed she had a First Amendment right to "insist on the makeup of the curriculum." *Ibid.*, p. 370.

In stark contrast, in this case, Cockrel dutifully complied with school administrative policies regarding her class curriculum. With Slate's knowledge and approval, Cockrel taught industrial hemp segments to her classes using outside speakers as part of her regular approved curriculum. Unlike in *Kirkland*, Cockrel complied with

school administrative procedure regarding Harrelson's first visit, and scrupulously complied twice with the new "controversial" visitor policy for Harrelson's second visit. Slate approved the first CNN/Harrelson visit, and he and Mooneyhan both approved the second CNN and Harrelson visits. [App. 1, pp. 4-8, 21, 43 ("the school in advance approved the subject matter and the speaker . . . [i]t now must pay the price for giving prior approval") (Siler J., concurring.)]. Also unlike the teachers in *Kirkland* and *Boring*, Cockrel has never claimed she has a First Amendment right unilaterally to dictate her class curriculum.

In the final analysis, the decision below is not in conflict with the decisions of other circuits. There is no conflict among the circuits warranting certiorari review merely because, applying *Connick,* they reach different conclusions based on the content, form, and context of the particular speech at issue. Different facts simply lead the Sixth Circuit to a different conclusion from the Fourth and Fifth circuits on the public concern – private interest issue. Thus, this case is inappropriate for certiorari review.

The facts overwhelmingly support the decision below, *Connick* was properly applied, and the "public concern" issue here would be decided the same way by other courts, including the Fourth and Fifth Circuits. There is no compelling reason to grant certiorari review.

The Court should deny the petition.

-II-

THE APPELLATE COURT'S "PARTICULARIZED BALANCING" DOES NOT "CONFLICT" WITH *PICKERING* OR *CONNICK*

The appellate court held Cockrel's speech constitutionally protected "because the balancing of interests under *Pickering* weighs in her favor." [App. 1, p. 32]. In reaching that conclusion, the appellate court reviewed the constitutionally relevant facts, and weighed Cockrel's interest in speaking on an important matter of public concern against the school district's interest in "an efficient operation of the school and a harmonious work environment." [App. 1, pp. 28-31]. In that particularized balancing, the appellate court properly required the school district to make a "strong showing" to outweigh Cockrel's free speech interest. In that regard, the court held the school district's reliance upon the "outcry within the school community" to support its position was misplaced because that outcry was traceable to the school district's prior approval of the speech and speaker. Consequently, that factor carried little weight in the *Pickering* balance. *Ibid.*

Petitioners assert the ruling below "conflicts" with *Pickering* and *Connick* because the appellate court erred by requiring the school district to make a showing of disruption directly caused by Cockrel's speech, [Pet., pp. 15-16], and that it incorrectly weighed *Mt. Healthy* "motivation" factors on the "threshold" *Pickering* issue, thereby improperly "merging" the *Pickering* and *Mt. Healthy* analyses. [Pet., pp. 17-18]. Petitioners are wrong, but, in any event, they merely disagree with the appellate court's legal conclusions in identifying and weighing the relevant

factors in striking the "Pickering Balance." Their objections do not present important issues requiring review by this Court.

There is no compelling reason to grant a writ of certiorari to review those alleged errors by the appellate court and the petition should be denied.

-III-

THE APPELLATE COURT DECISION DOES NOT "CONFLICT" WITH THE *MT. HEALTHY* CAUSATION STANDARD

The appellate court held there was a material dispute of fact whether the school district's termination decision was motivated in part by Cockrel's classroom speech about industrial hemp. [App. 1, p. 42]. The court noted there is a "substantially higher" summary judgment burden of persuasion on a moving party who has the burden of proof on an issue at trial. In addition, under *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999), summary judgment is "inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." [App. 1, p. 36]. Under this standard, the appellate court held petitioners failed to carry their burden of persuasion to rebut Cockrel's claim of pretext since the court was not confident that Cockrel's termination was *not* caused in part by her protected speech. [App. 1, p. 42].

In reaching this conclusion, the appellate court noted that the evidence showed Mooneyhan had Cockrel investigated after the first CNN/Harrelson visit, and threatened her if she invited Harrelson for a second visit. The court

also noted evidence that Slate singled Cockrel out for special teacher evaluations after each of the CNN and Harrelson visits, and that his adverse summative evaluation and firing recommendation, with attached letters complaining of her hemp presentations, was a factor in Mooneyhan's decision to terminate her. This evidence established Cockrel's *prima facie* case under *Mt. Healthy*. *Ibid.*

Reviewing petitioners' rebuttal evidence, the appellate court noted that they claim Cockrel was discharged solely because of the seventeen (17) administrative infractions charged in Mooneyhan's termination letter. [App. 1, pp. 68-76]. However, the court observed that some of these alleged infractions were trivial and would not justify termination, and most had occurred years before the first CNN/Harrelson visit. Mooneyhan had neither known about the infractions at the time they occurred, nor had Cockrel previously been disciplined for them. [App. 1, pp. 37-39, 41-42]. The court held that there was a clear material dispute of fact over Mooneyhan's threat to Cockrel about a second Harrelson visit – which he denies making. Together with the circumstances of Mooneyhan's investigation and reprimand, Slate's classroom visits and summative evaluation, and the complaint letters and PTA resolution – all relating to Cockrel's classroom hemp presentations – the court held "a reasonable jury could find, by a preponderance of the evidence, that Cockrel would not have been terminated had she not engaged in constitutionally protected activity." [App. 1, p. 42].

Petitioners assert that the lower court erred by imposing too heavy a summary judgment burden on the school district, failed to find that Cockrel did not establish a *prima facie* case of pretext, and claim the school district

carried its "burden of rebuttal" under *Mt. Healthy* as a matter of law. They base those contentions on Cockrel's failure to challenge the alleged administrative infractions in state administrative and judicial appeals. Petitioners argue that Cockrel's retroactive surrender of her teaching certificate disqualified her from teaching as of June 30, 1997, and therefore, as a matter of law, no reasonable jury could find otherwise than that Cockrel would have been terminated even in the absence of her protected speech. [Pet., pp. 19-21].

The appellate court rejected this convoluted contention when presented by petitioners as the basis for collateral estoppel. [App. 1, pp. 13-14]. It is equally flawed as a basis for judgment as a matter of law under *Mt. Healthy*. Factually, petitioners' "motivation" to fire Cockrel on June 30, 1997, could not have been based on surrender of her teaching certificate which did not occur until two (2) years later on March 11, 1999.

In sum, nothing in the appellate court decision "conflicts" with *Mt. Healthy*. There is ample evidence of record to support the Sixth Circuit decision, that court applied the correct standard under *Mt. Healthy*, and there was no procedural or substantive error in the court's causation analysis. This Court should not "correct" the decision, and there is no law for this Court to "clarify" here.

The Court should deny the petition for certiorari review.

CONCLUSION

Petitioners assert the decision below is "squarely at odds with *Connick*," [Pet., p. 13], that it "runs afoul" of the *Pickering* balancing test," [Pet., p. 16], and that it "conflicts with the *Mt. Healthy* causation standard." [Pet., p. 18]. The petition seeks only review of alleged appellate court errors. There is no conflict among circuits presented here for this Court to resolve. None of petitioners' contentions raise a compelling matter requiring certiorari review.

For the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

SHELBY COUNTY SCHOOL DISTRICT;
LEON MOONEYHAN, Officially and Individually;
BRUCE SLATE, Officially and Individually,

Petitioners,

v.

DONNA COCKREL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THERE IS A CONFLICT AMONG THE CIRCUITS

The resulting conflict among the circuits on the matter of whether teacher curricular presentations enjoy First Amendment protection under *Connick v. Myers*, 461 U.S. 138 (1983) is no mere assertion by Petitioners (*see* Response, p. 8), but is repeatedly acknowledged by the Sixth Circuit itself. Here, invoking the crucial passage that public employee speech is unprotected when the employee speaks "not as a citizen upon matters of public concern . . . ," *Connick*, 461 U.S. at 147, the Sixth Circuit states that the Fourth and Fifth Circuits have extended the holding of *Connick* beyond what this Court intended as applied to teacher curricular presentations. (App. to Pet., p. 24).[1] The Sixth Circuit holds that the Fourth and Fifth Circuits have read *Connick* too broadly stating flatly "contrary to the analyses in *Boring* and *Kirkland*, we hold that Cockrel's speech does touch on matters of public concern." (App. to Pet., pp. 25-26 (footnote omitted).) Respondent's claim that this gives rise to no conflict in terms of jurisprudence, decisional criteria, or analytical methodology (Response, p. 9), is belied by the Sixth Circuit's decision itself.

Ironically, also departing from the Sixth Circuit's analysis, Respondent seeks to factually distinguish *Boring* and *Kirkland*, arguing the "content, form, and context of

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[1] *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir.) (en banc), *cert. denied*, 525 U.S. 813 (1998); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 797-99 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

the speech in those cases [is] fundamentally different from the speech in this case." (Response, p. 9.) However, the Sixth Circuit noted its fundamental disagreement with both the Fourth and Fifth Circuits on its reading of *Connick* and declined to consider the form and context of Cockrel's purportedly protected expressive activities in its analysis. To the Sixth Circuit, the determinative question was not whether the teacher was seeking to impart a message or communication in his or her role as a citizen as gleaned from the form and content of the expressions, but whether the expression itself touched upon a matter of social or political importance. This is squarely at odds with *Boring* and *Kirkland*.

Boring, *Kirkland*, and the case at hand, all involve curricular presentations undertaken by teachers in the actual performance of their duties as employees rather than citizen speech in furtherance of the right to participate in public affairs. Respondent's focus on non-dispositive differences in form and context simply bears out the Sixth Circuit's fundamental error in failing to consider these factors on the record below. Indeed, Petitioners' argument on this point (that the Sixth Circuit failed to properly consider the form and context of the speech at issue as mandated by *Connick*) (*see* Petition, pp. 12-13) is not directly challenged in the Response.

Finally, in *Boring*, the teacher argued that school administrators passed on the controversial play at issue prior to its production and, accordingly, the school administration was in no position to discipline her for its use in the curriculum. *Boring*, 136 F.3d at 371 n. 3. To borrow Respondent's phrase, this was not a "constitutionally relevant" fact in that such was properly characterized as a species of due process argument which had been decided

adversely to the teacher. *Id.* Here, Cockrel's purported dutiful compliance with school administrative policies regarding guest speakers (*see* Response, p. 10), is likewise of no moment and, indeed, further underscores a proper finding that "employee" as opposed to "citizen" expressions were at issue below.

II. BALANCING OF INTERESTS UNDER *PICKERING* AND *CONNICK*

Cockrel claims to be a party injured under 42 U.S.C. § 1983. Cockrel claims to have engaged in protected speech under the First Amendment by way of her fifth grade "classroom presentations" on hemp. With respect to the balancing mandated under *Pickering v. Board of Education*, 391 U.S. 563 (1968), Cockrel successfully avoided the legal effect of the conceded "outcry within the school community" by urging her claimed compliance with applicable guest speaker policies on the Sixth Circuit. (Response, p. 12.)

The Petitioners' argument that the Sixth Circuit failed to properly apply the mandated *Pickering* balancing bears out more than a mere disagreement with the Sixth Circuit's reasoning and instead is premised on this Court's holding that the "inquiry into the protected status of speech is one of law, not fact," *Connick*, 461 U.S. at 148 n. 7. The substantial, ongoing disruption occasioned by Cockrel's classroom hemp presentations must be assessed as a matter of law. Not only did the Sixth Circuit subject Petitioners to a heightened burden, the Sixth Circuit handled the matter of the *Pickering* balancing as if it were an issue of fact when the precedents of this Court direct

otherwise. Review on this issue is clearly warranted. *See* Rule 10(c) of this Court

III. *MOUNT HEALTHY* CAUSATION

Cockrel was terminated on statutory grounds of insubordination, conduct unbecoming a teacher, and inefficiency, incompetency, and neglect of duty based on seventeen (17) instances of misconduct set forth in Superintendent Leon Mooneyhan's July 15, 1997, charging letter (App. to Pet., pp. 68-76). Significantly, Cockrel merely claims that four (4) of the seventeen (17) charges "related to Harrelson's visits to Cockrel's classroom . . . " (Response, p. 6). However, not even these charges related to the communication of the expressions deemed by the Sixth Circuit to touch upon a matter of public concern, *e.g.*, the discussion of the merits of industrial hemp before fifth graders.[2]

Under KRS 161.120(2)(a), Superintendent Mooneyhan was duty-bound to report the termination of Cockrel's contract to the Education Professional Standards Board ("EPSB") and Mooneyhan submitted the letter effecting Cockrel's termination. It is worthy of note that Cockrel's repeated argument that Mooneyhan sought the revocation of her certificate is inaccurate since, as was the case with the earlier private reprimand relating in part to the display of contraband (hemp seeds) during Harrelson's

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[2] Cockrel was charged with student confidentiality violations relating to media coverage of the visits, deceptiveness regarding the timing of Harrelson's visits, and failing to require visitors to check in on the date of one of the visits. (App. to Pet., pp. 70-75.)

first visit, Mooneyhan was fulfilling his statutory function in reporting conduct to the central state teacher certification agency. The matter of "taking action to initiate proceedings to revoke a certificate" which implicates a formal adversary hearing apparatus over which local Kentucky school district officials have no authority is vested solely in the EPSB. *See* KRS 161.120(2)(c) (App. to Pet., p. 65).

Acting on the Superintendent's report of the letter effecting the very termination she challenged below, and with Cockrel's knowing agreement and waiver of hearing rights, the EPSB (Case #97-07144) directed the surrender and suspension of her teaching certificate commencing as of a time predating the termination she challenges. (Joint Appendix, pp. 50-52.)

The termination of Cockrel's contract for cause, and the suspension and surrender of her certificate, were undisputed facts on the summary judgment record. Accordingly, Cockrel stood on a less firm footing than the non-tenured teacher who was the subject of *Mount Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). In *Mount Healthy*, this Court emphasized the necessity of formulating "a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused," and refused to sanction a rule of causation focusing solely on whether protected conduct played a part in a challenged decision. Such a formulation "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mount Healthy*, 429 U.S. at 285-286.

Here, the Sixth Circuit gave Cockrel's termination for cause short shrift and completely ignored the surrender

and suspension of her teaching certificate in its *Mount Healthy* causation analysis. Cockrel argues that Petitioners' motivation to terminate her as of the commencement of the surrender of her license to teach (June 30, 1997) could not have been in issue since the EPSB did not take such action until March 11, 1999. Regardless of Respondent's argument relating to the timing of Petitioners' allegedly impermissible motivation, *Mount Healthy* counsels that "[t]he constitutional principle at stake is sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct." *Mount Healthy*, 429 U.S. at 285-286. Cockrel's termination, and, indeed, her inability to teach in *any* Kentucky school district cannot, as a matter of law, be said to have been caused by these Petitioners since a separate, central state agency ordered the surrender and suspension of her teaching certificate as of a date predating her termination for cause. Particularly given its complete failure to consider the action on Cockrel's certificate in its causation analysis, the Sixth Circuit has sanctioned a causation standard placing the employee in a better position as a result of the exercise of purportedly constitutionally protected expressive conduct than the employee would have occupied had she not engaged in such conduct. Even separate and apart from the Court's flawed formulation of Petitioners' burden of rebuttal (*see* Petition, p. 20), this is squarely at odds with *Mount Healthy* and compels review and correction by this Court.

CONCLUSION

For the reasons stated above and in the Petition, this Court is respectfully requested to grant the Petition for Writ of Certiorari.

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